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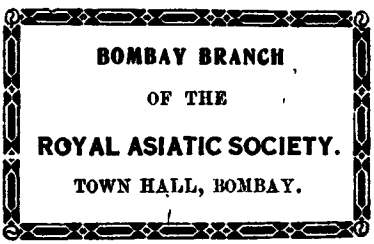

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Bombay High Court Reports.

VOLUME III.

REPORTS OF CASES

DECIDED IN THE

HIGH COURT OF BOMBAY.

1865-67.

300

EDITED BY

RICHARD TUOHILL REID, LL.D.,

BARRISTER AT LAW.

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ERRATA.

Page		
2—8	O.C.J.	*For* "1865" in *date* of judgment *read* "1866."
21	„	Note (*e*), after "11 A. & E." *insert* "859."
113	„	Marginal note, line 4, *for* "The purchase by P. B." *read* "The purchase by B. P."
125	„	Marginal note, 3rd line, *for* "seven hundred" *read* "seven thousand."
136	„	*For* "1866" in margin *read* "1867."
„	„	6th line from the foot, *for* "but should wait for an order of this court" *read* "but should wait for an order of court."
140	„	*For* "Burges Col. Laws" *read* "Burges' Colonial Law."
148	„	*For* "And in Story on Bailments there was an American case," &c., *read* "And in Story on Bailments there is an American case," &c.
12	A.C.J.	Line 1, *for* "on" *read* "in."
23	„	In name of case, for "Ibráhim Fakír" *read* "Ichhárám Fakír."
62	„	At the end of the judgment *insert* "NEWTON, J., concurred."
68	„	In line 4 of note, *for* "share" *read* shares."
102	„	*For* "1867" in margin read "1866."
123	„	Note, *for* "*Armory Delamirie*" read "*Armory* v. *Delamirie*."
12	Cr.Ca.	Seventh line from bottom, *for* "Deputy Magistrate" *read* "F. P. Magistrate."
23	„	Fifth line from bottom, *for* "Caroline Winsor" *read* "Charlotte Winsor."
36	„	In line 4 of note, *for* "a similar neglect to comply with" *read* "similar irregularities in a case under."
50	„	*For* "June 1" in margin read "Oct. 31."

ERRATA

Page.		Line.	
2—8	O. C. J.	..	*For* "1865" in *Date* of Judgment, *read* "1866".
12	A. C. J.	1	*For* "on" *read* "in".

CASES

DECIDED IN THE

ORIGINAL CIVIL JURISDICTION

OF THE

HIGH COURT OF BOMBAY.

Suit No. 777 *of* 1865.

THE ORIENTAL FINANCIAL ASSOCIATION (LIMITED)

v.

THE MERCANTILE CREDIT AND FINANCIAL ASSOCIATION (LIMITED).

Sale of Shares and repurchase for future delivery—Forfeiture—Liability of Company for acts of Directors.

In January 1865, the plaintiffs purchased from the defendants 2,000 shares in the defendants' Company, at 15 per cent. premium, for which they paid in cash Rs. 3,20,000; and the defendants simultaneously agreed to repurchase for future delivery and payment at a fixed time in July the same 2,000 shares at 29½ per cent. premium. The contracts for the repurchase were signed by three directors of the defendants' Company, and on each was a memorandum, initialed by two of them, referring to a list of the "share receipts" delivered, with the words, "We are duly to examine and receive the same at the fixed time." 190 letters of allotment, in the names of several persons and for various numbers of shares, endorsed by the original allottees, and initialed by one of the three directors, were, together with receipts for the first call, handed over to the persons who acted for the plaintiffs, by the three directors of the defendants' Company who made the contracts.

In April the defendants' Company made a fresh call payable on the 4th of May. A list of the names and addresses of the original allottees of what were called "shares in the market," (*i. e.* other than those purchased by the Company itself *for cash*, or held by it on mortgage) was made out from the deed of settlement, and notices of forfeiture for non-payment of the call were sent by post. The original holders of the 190 letters of allotment were included in the list; but no notice was sent to the plaintiffs. On the 27th of May all shares upon which the 2nd call was not paid were declared to be forfeited for the benefit of the Company. The defendants' Company, as stated in the Memorandum of Association, was established, among other objects, for "the purchase and sale of Debentures, Stocks, Shares of Joint Stock Companies (including the shares of this Company), and other Securities, the making Loans and Advances on such Securities as the Directors of the Company may think fit."

Held that the contracts for the repurchase of the 2,000 shares, being within the scope of the authority of the directors, the defendants were bound by them; that the defendants were bound to treat the plaintiffs as the holders of those shares, and to give them the notice required by the Articles of Association, and that they were not at liberty to give that notice to the original allottees, who by the admission of the defendants testified by the acts of their agents in making the contracts, had parted with the shares; that the shares were, consequently, not legally forfeited, and the defendants having refused to accept them, and they being then unsaleable, the plaintiffs were entitled to recover the full price as damages.

March, 23, 24, 26, April 5.
O. S. No. 777 of 1865.

THIS was a suit to recover Rs. 4,36,000, the price of shares, which the defendants refused to accept.

On the 18th of November 1865, judgment by default for non-appearance was passed against the plaintiffs, which was afterwards (3rd Feb.) set aside under Sec. 119 of Act VIII. of 1859, and the suit ordered to be proceeded with (*a*).

Bayley, *McCulloch* and *Macpherson* for the plaintiffs.

The Hon'ble J. S. White, (*Acting Advocate General*) *Howard* and *Green* for the defendants.

The facts sufficiently appear in the judgment.

Cur. adv. vult.

1865.
June 9.
O. S. No. 777 of 1865.

COUCH, C. J.—The plaint in this suit stated that, on or about the 3rd of January 1865, the plaintiffs purchased from the defendants, and the defendants sold to the plaintiffs, 2,000 shares in the Mercantile Credit and Financial Association at the rate of Rs. 15 per cent. premium, and the plaintiffs paid to the defendants rupees three lacs and twenty thousand for the same; and that the defendants, simultaneously with the abovementioned sale, agreed to re-purchase from the plaintiffs the same 2,000 shares at the rate of Rs. 29½ per cent. premium, to be delivered and paid for between the 1st and 15th days of July then next ensuing; and two agreements in the Guzeráthí language and character, bearing date the 3rd of January 1865, and respectively signed by the duly authorized agents of the defendants in that behalf, each agreement being for one thousand shares, were executed for the purpose of carrying out the last mentioned contract; and that the defendants refused to take

(*a*) 2 Bom H. C. Rep. 282.

delivery of the shares; and claimed as damages rupees four lacs and thirty-six thousand.

1865. June 9. O. S. No. 777 of 1865.

On the 29th of September 1865, the following issues were settled:—(1) Whether the defendants agreed to purchase from the plaintiffs the 2,000 shares mentioned in the plaint; (2) whether the plaintiffs were ready and willing to perform their part of the agreement; (3) whether the plaintiffs sold the shares before the expiration of the time fixed for the delivery, and thereby lost their right to sue the defendants for the breach of the contract; (4) whether the contract was a contract by way of gaming and wagering contrary to Act XXI. of 1848; and the substantial questions raised at the hearing between the parties were, whether the defendants were bound by the contracts which had been signed by three of their directors on behalf of the Company; and whether the shares had, before the time for delivery, been legally forfeited for non-payment of a call, and the plaintiffs thereby rendered incapable of performing the contract.

The contracts were signed by C. F. Heycock, Vináyak Pándúrang, and Lalubhái Máneklal, three of the directors of the defendants' Company, and were as stated in the plaint; and on the back of one of them was the following memorandum:—"Having signed, you have delivered to us a list of the 'share' receipts. We are to receive the receipts in accordance therewith. We are duly to receive the same after examining them with the initials which have been made thereon. We are duly to examine and receive the same at the fixed time of July;" and on the other a similar memorandum, except that the words "after examining them" were omitted before the words "with the initials;" each memorandum having to it the initials L. M. and V. P. The list referred to in these memoranda, and a number of letters of allotment of, and receipts for the first call of Rs. 100 on shares in the Mercantile Credit and Financial Association, bearing the initials V. P., were produced at the hearing. These letters of allotment were 190 in number, and were in the names of many different persons and for various num-

1865. June 9. O. S. No. 777 of 1865.

bers of shares. At the time of the transaction a cheque was given into the hands of Vináyak Pándúrang for Rs. 3,20,000, drawn upon the Asiatic Banking Corporation by three of the directors of the plaintiffs' Company, and payable to the Mercantile Credit and Financial Association, which was presented for payment on the 7th of January 1865, and the amount was then placed to an account which was opened by the Asiatic Banking Corporation in the names of C. F. Heycock and Vináyak Pándúrang. The defendants' Company had no account with the Asiatic Banking Corporation.

In the 3rd clause of the Memorandum of Association of the defendants' Company it is stated that the objects for which the Company was established were, " the purchase and sale of Debentures, Stocks, Shares in Joint Stock Companies, (including the shares of this Company,) and other Securities, the making Loans and Advances on such Securities as the Directors of the Company may think fit."

It was contended for the defendants that the contracts were made by the directors in fraud of the shareholders, and could not be enforced against the Company. I think it may be taken upon the evidence to be the fact, that the proceeds of the cheque for Rs. 3,20,000, which were placed to the account of C. F. Heycock and Vináyak Pándúrang, were not made use of for the benefit of the shareholders, but were applied for the private purposes of those persons and Lalubhái Máneklal; and that a fraud was practised upon the shareholders, either by shares which were the property of the Mercantile Credit and Financial Association being sold by the three directors who signed the contracts, and the produce of the sale being misapplied, or by the Company's name being used by those directors in selling shares which really belonged to themselves, and had been either originally allotted to them and the other promoters of the Company in the names of other persons, or had been purchased by them; but Issá Ahmed, one of the directors of the plaintiffs' Company, who was called as a witness, said he took part in the arrangement of the contract and negotiated with the broker and Lalubhái and Vináyak; and that they represented to him that they were contracting on behalf of the Mercantile Credit

1865. June 9. O. S. No. 777 of 1865.

and Financial Association, and that the shares belonged to the Association; that they did not tell him why they wanted him to buy the shares, nor did the brokers tell him they had a scheme for raising the price of the shares.

Now, there was no necessity for the directors of the defendants' Company, who made the contracts, to acquaint the persons who contracted with them on behalf of the plaintiffs of their views or intentions; and I think the probability is in favour of their not having done so. And if, as is probable, the intention was to raise the price of the shares, I think that the shareholders, who had by the Memorandum of Association authorized the dealing in the shares of the Company, cannot avoid the contract, unless it appears that the contract was not intended to be a real one; and that the parties to it conspired together to impose upon the public, and make it appear that the shares were of greater value than they really were. Such a case as this is not proved by the evidence given in the suit; and I think that, these contracts being within the scope of the authority of the directors, the defendants are bound by them. It, therefore, becomes necessary to consider, whether the shares had become forfeited before the time fixed for the delivery.

By Clause 35 of the Articles of Association it is provided that "If any shareholder fails to pay any call due on the appointed day, the Board may at any time thereafter, during such time as the call remains unpaid, serve a notice on him requiring him to pay such call, together with any interest and expenses that may have accrued by reason of such non-payment. The notice shall name a future day (not being less than fourteen days from the date of the notice) on or before which such call, interest, and expenses are to be paid; it shall also name the place where such payment is to be made, the place so named being either the Registered Office of the Company, or some other place at which calls of the Company are usually made payable. It shall also state that, in the event of non-payment of such call, interest, and expenses at or before the time and at the place appointed, the shares in respect of which such call was made

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will be liable to be forfeited." And by Clause 36, "If the requisitions of any such notice as aforesaid are not complied with, any share in respect of which such notice has been given may, at any time thereafter, before payment of all calls, interest and expenses due in respect of such share has been made, be forfeited by a resolution of the Board to that effect."

It was proved by Mr. Weatherhead, the Manager of the Mercantile Credit and Financial Association, that on the 10th of April 1865 a resolution was made by the Board of Directors, that a call of Rs. 150 per share should be made, which was advertised in the *Times of India* and *Bombay Gazette* newspapers, and two native newspapers, the *Bombay Sumáchár* and *Dnyán-bodak*, all published on the 12th of April, the 4th of May being the day appointed for payment; that the call continued to be advertised till the 5th of May, on which day, by order of the directors, he sent notices to the shareholders. The manner in which this was done, he said, was that he had a list made out of what he calls shares in the market, which were the shares other than those which the Company had purchased for cash, or had taken by way of mortgage. This list contained the names of the parties to whom allotment letters were made out; and notices of forfeiture were made out for every name in that list. A copy of the names and addresses of the allottees was made from the deed of settlement by a clerk of Mr. Leathes, the solicitor of the Company (but who was not called as a witness, nor was the copy proved to be correct); and the addresses were copied from this list, and Mr. Weatherhead checked the names from the list which he had made, which did not contain the addresses; and the notices were taken to the post office by a peon in the defendants' service.

On the 27th of May, a resolution was passed by the Board of Directors, that all the shares in the names of the allottees, in respect of which the second call of Rs. 150 per share had not that day been paid, were declared to be forfeited for the benefit of the Company. Each of the share papers referred to in the memoranda, on the back of the contracts of which the list was made, and which bore the initials V. P. as I have

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stated, had on the back of it a signature which purported to be the signature of the allottee, and was in that state at the time the contracts were made, and had been delivered in that state to the persons, who acted on behalf of the plaintiffs, by the directors of the defendants' Company, who made the contracts. Under these circumstances I think the defendants were bound to treat the plaintiffs as the holders of these shares, and to give to them the notice required by the 35th clause; and were not at liberty to give the notice to the original allottees, who had, by the admission of the defendants testified by the acts of their agents in making the contracts, parted with the shares.

Sections 14 and 15 of Act XIX. of 1857, as well as Clause 13 of the Articles of Association, require a register to be kept by the Company, in which shall be entered the names, addresses, and occupations of the holders of shares. Mr. Weatherhead said there was a register of the Company when he became the manager, which was on the 8th of February 1865; but that this was not such a register as the law required, may be inferred from the statements of Mr. Mayhew, one of the directors of the defendants' Company, who was examined as a witness for them, and who said that the object of the call was to meet the liabilities of the Company, and also to force the holders of allotments to come forward and be placed on the register; as well as from the fact that the addresses to the notices were taken from the deed of settlement. If what Mr. Mayhew states was *bonâ fide* the object of the call, the obvious course would have been to serve the notice upon the plaintiffs, who were precluded by their contracts from denying that they were the holders of these shares; and their name might also, I think, have been entered in the register.

The defendants relied upon Clause 134 of their Articles of Association, which provides that "Every Shareholder shall from time to time leave at the Registered Office of the Company an address somewhere in the Island of Bombay, giving the name of the street and the number of the house, if any, and all Summons, Notices, or other Documents sent through

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the Post Office to or left at the last registered address of each Shareholder shall be deemed to have been well served on the Shareholder giving such address, and in case of any Shareholder neglecting to give such address it shall not be competent for him to object to any act or proceeding of the Company on the ground merely that due notice thereof was not sent to him." But I think it does not apply to this case. Granting that the address given in the Articles of Association may be considered as an address left at the registered office of the Company by a shareholder within its meaning, still the persons who signed the articles and whose addresses were given, were not, as regards these shares, shareholders at the time the call was made, nor were the defendants entitled to treat them as shareholders. The defendants are relying upon a forfeiture, under circumstances which render it more than ordinarily incumbent upon them to show that the provisions of the Articles of Association, enabling them to forfeit the shares, were strictly complied with; and I think they have failed to do this. Without, therefore, giving an opinion as to whether the call was made *bonâ fide*, upon which I think the evidence is not sufficient to enable me to decide, I must declare that the shares were not legally forfeited.

It was contended, but as it appeared to me somewhat faintly, for the defendants, that the plaintiffs ought to have got transfers from the allottees before the 1st of July; but the memoranda, which must be taken to form part of the contract, show that this was not the intention of the parties. The contract cannot be regarded as one for a strictly legal transfer of the shares, but rather for a transfer of the title to them contained in the allotments and receipts for the first call.

The shares not having been legally forfeited, the plaintiffs were able and ready and willing to do all that they were bound to do by the contract; and it being proved that at the time the defendants refused to accept the shares they were unsaleable, they are entitled to recover the full price as damages. I, therefore, find the issues for the plaintiffs, and give judgment in their favour for Rs. 4,36,000 and costs.

Judgment for Plaintiffs.

Suit No. 285 *of* 1866.

THE EASTERN FINANCIAL ASSOCIATION (LIMITED)

v.

PESTANJI CURSETJI SHROFF.

Sale of Shares—fraud—illegal purpose—Articles of Association—option of shareholders—promissory note payable on demand—Schedule A, cl. 10 of Stamp Act, No. X. of 1862.

In a suit brought by a joint stock company in liquidation against a former director of the company for Rs. 27,30,000, on a promissory note, dated the 1st of March, and purporting to be payable on demand, but with the words in pencil: "Due 4th June," put on it the same day it was signed, in accordance with an understanding between the defendant and the other directors that they would not press him for payment before the latter date, and signed by the defendant some days after the day it bore date:—*Held* that a one-anna stamp was not sufficient, under Schedule A, cl. 10 of Act. X. of 1862.

And, on the plaint being amended by claiming for the price of shares bargained and sold to the defendant, but not accepted by him; and for money found to be due on an account stated:—*Held* that the plaintiffs could not recover, 1st, because no shares were really bargained and sold as the plaint alleged; and what was done was, according to the intention and understanding of the parties, a mere form gone through, for the purpose of deceiving the public, and making it appear that 10,000 shares had been sold at a certain price; and, 2ndly, because the contracts were made for the purpose of defrauding other persons.

Held, also, that the 9th clause of the articles of association, providing that the existing shareholders for the time being should have the option of taking and subscribing for the shares in the additional capital, rateably and in proportion to their respective shares in the existing capital of the company, being imperative, and not merely directory, a deviation from it could not be made unless with the assent of every shareholder.

1866. August 16, 17, 18. O. S. No. 285 of 1866.

THIS was a suit on defendant's promissory note for Rs. 27,30,000, being the aggregate price of 10,000 newly issued shares in the plaintiff's company, alleged to have been purchased by the defendant at a public auction; and also (after amendment) for the amount of the note and interest, as the price of shares bargained and sold to, but not accepted by, the defendant; and on an account stated.

The case was heard by COUCH, C. J., in a Division Court.

Howard and *Green* for the plaintiffs.

Scoble and *McCulloch* for the defendant.

1866. August 16, 17, 18. O. S. No. 285 of 1866.

The facts (so far as material) are stated in the judgment.

In the course of the argument the following authorities were cited:—*Reg.* v. *Justices of Shropshire* (*a*); *In re The British Sugar Refining Co.* (*b*); *In re The Athenæum Life Insurance Society, Richmond's Case* (*c*); *In re The Magdalena Steam Nav. Co.* (*d*); *The Hull Flax and Cotton Mill Co.* v. *Wellesley* (*e*); *Bargate* v. *Shortridge* (*f*); Act XIX. of 1857, *passim*.

Cur. adv. vult.

December 1. COUCH, C. J.:—The plaint in this suit stated that the plaintiffs caused to be sold, by public auction, 12,500 shares, then newly issued, of the Eastern Financial Association (Limited); and the defendant at such sale became the purchaser of 10,000 of the said shares at different prices, amounting in the aggregate to Rs. 27,30,000, and on the terms that the defendant was to pay a deposit of Rs. 100 per share on the said shares at once, and the residue of the purchase-money within thirty days: that the defendant did not pay the deposit or any part of the purchase money; and to secure payment of the purchase-money he, on the 1st of March 1865, made his promissory note dated on that day, promising to pay to the plaintiffs on demand Rs. 27,30,000: that payment of that sum had been duly demanded, and the defendant had not paid it.

The defendant put in a written statement, in which he alleged that the sale by auction of the 12,500 shares was illegal and unauthorised by the articles of association of the company: that the sale was not intended to be, nor was it a *bonâ fide* sale; but was solely for the purpose of rigging the market, and unduly enhancing the price of shares in the company: that the plaintiffs were not ready and willing to deliver to him the 10,000 shares, or documents of title thereto: that the promissory note sued upon ought not to be received in evidence, inasmuch as it did not bear a sufficient stamp.

(*a*) 8 A. & E. 173. (*b*) 3 Kay & J. 408. (*c*) 4 Kay & J. 305.
(*d*) 29 Law J., N. S., Ch. 667. (*e*) 30 Law J., N. S., Ex. 5.
(*f*) 5 H. L. Ca. 237.

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The suit came on for hearing on the 16th of August last; and, in order to raise the question as to the sufficiency of the stamp, an issue was first recorded, whether the defendant made the promissory note mentioned in the plaint.

The note was produced and the signature proved to be the defendant's handwriting. It bore date the 1st of March 1865, and had on it a stamp of one anna, and it purported to be payable on demand, but above the date were in pencil the words "Due 4th June." The witness who proved the defendant's signature said the pencil note was put on it by one of the plaintiffs' clerks, and he had no doubt it was put at the time it was drawn; and (the plaintiffs' counsel not objecting to the admissibility of the evidence) he went on to say, that it was understood that the witness, who was the manager of the Eastern Financial Association, would not press the defendant for payment until the time named in the pencil memorandum, but that if he was in a position to pay before, he would do so. That a letter was sent to the defendant by the authority of the liquidators of the company, a copy of which was, with the consent of the plaintiffs' counsel, put in evidence instead of the original. At the foot of this letter, which was dated the 18th of December 1865, and addressed to the defendant and signed by the liquidators (the company being then in the course of being wound up), were the words "Amount of your promissory note overdue from 4th June 1865." A book of the plaintiffs was also produced, which, the witness said, was the book of local bills discounted, in which he said the entry relating to this note was "term three months" and "rate of discount," but no discount was charged. He further said, that the note was signed some days after the date. That before it was signed a resolution was passed by the directors granting time for its payment. That the pencil note was put the same day it was signed—he should think the same day it was signed—and it was done in accordance with the understanding between the directors and the defendant.

Upon this evidence I was of opinion that this was not a note payable on demand and bearing the date on which it

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was made, and that under Act X. of 1862, Schedule A, Clause 10, a one-anna stamp was not sufficient; and the plaintiffs by their counsel declining to avail themselves of Sec. XVII. of the Act and pay the penalty, the note was not put in evidence. From this it followed that the first issue would be found for the defendant.

The plaintiffs then sought to recover upon the consideration for the note; and the following issues were framed (the plaint being, subsequently during the hearing, amended by inserting, at the request of the plaintiffs' counsel, a claim for the amount of the note and interest, as the price of shares bargained and sold to the defendant, but not accepted by him; and as money found to be due from the defendant to the plaintiffs, on an account stated):—(2) whether the defendant purchased of the plaintiffs the shares in the plaint mentioned on the terms stated; (3) whether the sale of the shares was illegal, or not authorised by the articles of association of the plaintiffs' company; (4) whether the sale was a *bonâ fide* sale and not merely a colourable one; (5) whether the plaintiffs were able to deliver the shares in pursuance of the contract; (6) whether the plaintiffs can now recover the price of the shares, except by suing on the promissory note mentioned in the plaint.

The case then proceeded, and evidence was given for the plaintiffs, that a general meeting of the shareholders of the Eastern Financial Association was held on the 22nd of December 1864, at which a resolution was passed that the capital should be doubled, and the defendant was appointed a director, the then directors having previously appointed him. That advertisements of the sale of 12,500 shares were issued. That the sale was held, and the defendant bid at it; and it was admitted by his counsel that 10,000 shares were knocked down to him, at the price mentioned in the plaint. They were sold in separate lots. That by the conditions of sale, published by the auctioneer, a deposit of Rs. 100 per share was to be paid, and the balance at the end of thirty days from the day of sale. That the defendant did not pay a deposit, but some of the other purchasers did. The

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defendant was appointed by the directors to be a director on the 24th of October, in the place of a director who resigned; and he had been acting along with the other directors for some time previously.

The substantial questions in the case appear to me to be, whether the sale to the defendant was a *bonâ fide* sale, and not colourable only; and whether the plaintiffs were able to deliver the shares in pursuance of the contract, which involves the question, whether the sale was illegal, or was not authorised by the articles of association; in either of which cases the plaintiffs cannot confer upon the defendant a legal title to the shares.

Upon the first of these questions there is the evidence of the defendant, upon which, if it stood alone, I should not place any reliance; he being not only interested in the event of the suit, but having also, by his own account, been an active party in a transaction of a very questionable nature. I must see how far the other evidence, of the truth of which I feel satisfied, makes it probable that his statement is a true one. The plaintiffs' counsel examined him as his witness, but his statements must be looked at in the same way as if his own counsel had called him. His evidence was that, in October 1864, the directors wrote to him a letter, asking him to become a nominal director; that he joined them in October, and took much part in the management of the Financial Association. He was present at the meeting on the 22nd of December, and agreed to the proposition that 12,500 shares should be sold by auction. He believed he bid at an increased rate to the bazár rate, in order to support the shares he then had. It was to increase the bazár rate. He then had about 15,000 shares. He purchased at the auction at a higher rate than it was in the market. He bid for himself alone, but other persons (whose names, and the number of shares each was entitled to, he gave) had an interest in the 15,000. He did not intend to pay for the shares, and did not intend to pay the promissory note. That the other directors held many shares, and were all interested in raising the bazár rate. Before the day of the auction there were

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several conversations that it was desirable to raise the price of the shares, and he undertook to go in and buy at the auction. That his co-directors were aware of his intention to raise the price, and that he could not pay that large amount. That in March 1864 shares were beginning to fall, and they then threatened to put the shares in the market, and lower the price of his old shares. It was agreed by the directors, when he signed the note, that they were not to put him in any difficulty—not to press him.

Now the price at which the shares were sold to the defendant was 42 per cent. premium, and the evidence of Keshavjí Naik, one of the directors of the company, was that, before the meeting of the 22nd of December, the shares were at a premium of from 60 to 65 per cent., and after the meeting and before the auction they were about 80. Allowing for the difference in the value that would be caused by the issue of the 25,000 new shares, this agrees with the defendant's statement, that he purchased at the auction at a higher rate than it was in the market, in order to support the price of the shares and increase the bazár rate. And this was done after conversations with the other directors, who held many shares, that it was desirable to raise the price, and they were aware of the defendant's intention.

But the most material circumstances, indicating the real nature of the transaction and confirming the defendant's evidence, are the entire want of compliance with the conditions of sale, and the subsequent conduct of the parties. By the conditions a deposit of Rs. 100 per share was to be paid at the time of the sale, and the balance within thirty days, and in case of non-payment of the balance the deposit was to be forfeited. No deposit was paid by the defendant. The plaint states that. The plaintiffs' counsel said, in the course of his examination of the defendant, that a cheque was given, but, in some way or other, it was afterwards returned by the Association. If that were so, it would probably be still more significant of the colourable nature of the transaction than the mere non-payment of the deposit. The sale was on the 14th of January, and until March nothing appears to have been

done upon it. The defendant says that in March the shares were beginning to fall; and the directors then threatened to put the shares in the market and lower the price of his old shares: in consequence of which he gave the promissory note; but that he was not to be pressed, and was to pay only in the event of the shares going up; and the note is given in March with an agreement that it was not to become due till the 4th of June. The parties had probably, when the shares were beginning to fall, become aware that it would be necessary to take some steps to give an appearance of reality to the purchase at the auction. All the circumstances appear to me to lead to the conclusion, that the intention of the parties was what the defendant has stated; and that the sale to the defendant was not a *bonâ fide* one, but was made for the purpose of imposing upon the public and keeping up the price of the shares. The bubble had not then been sufficiently inflated to satisfy the desires of its authors.

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Now, upon this state of facts, the plaintiffs cannot recover from the defendant the price of the shares which were knocked down to him at the auction, for two reasons. First, because no shares were really bargained and sold as the plaint alleges; and what was done was, according to the intention and understanding of the parties, a mere form gone through for the purpose of deceiving the public, and making it appear that 10,000 shares had been sold at a certain price. And, secondly, because courts of justice do not enforce contracts made for the purpose of defrauding other persons.

"By constructive frauds are meant such acts or contracts as, although not originating in any actual evil design or contrivance to perpetrate a positive fraud or injury upon other persons, are yet by their tendency to deceive or mislead other persons, or to violate private or public confidence, or to impair or injure the public interests, deemed equally reprehensible with positive frauds, and therefore are prohibited by law as within the same reason and mischief as acts and contracts done *malo animo*. Although, at first view, the doctrines on this subject may seem to be of an artificial, if not of an arbitrary, character; yet upon closer observation they

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will be perceived to be founded in an anxious desire of the law to apply the principle of preventive justice, so as to shut out the inducements to perpetrate a wrong, rather than to rely on mere remedial justice after a wrong has been committed. By disarming the parties of all legal sanction and protection for their acts, they suppress the temptations and encouragements which might otherwise be found too strong for their virtue."—Story's Eq. Jur., Sec. 258. "And here the general rule is, that particular persons in contracts and other acts shall not only transact *bonâ fide* between themselves, but shall not transact *malâ fide* in respect to other persons who stand in such a relation to either as to be affected by the contract or the consequences of it. And as the rest of mankind besides the parties contracting are concerned, the rule is properly said to be governed by the public utility."—"*Ibid.* Sec. 333, quoting from the judgment of Lord *Hardwicke* in *Chesterfield* v. *Janssen* (*g*). Where A agreed to give B a certain sum for goods in advancement of C, a secret agreement between B and C that the latter should pay a further sum was held void as a fraud on A, and B was not allowed to recover upon it"—*Jackson* v. *Duchaire* (*h*). "The reports in every period of the English Jurisprudence and our American reports equally abound with cases of contracts held illegal on account of the illegality of the consideration; and they contain striking illustrations of the general rule, that contracts are illegal when founded on a consideration *contra bonos mores*, or against the principle of sound policy, or founded in fraud, or in contravention of the positive provisions of some statute law"—2 Kent's Comm. 10th ed. 635. "Equally unavailing is the instrument (a bill of exchange or promissory note) if given in fraud of third persons"—Byles on Bills, 8th ed. 121. *Pacta quæ turpem causam continent non sunt observanda.* Dig. lib. 2, tit. 14, l. 27. "Thus it is also an essential character of all covenants that they contain nothing that is unlawful and dishonest, and it is a vice in a covenant if anything is inserted in it contrary to law and good manners."—Domat's Civil Law by Cushing, Part I.,

(*g*) 2 Ves. 156-7; 1 Wh. & Tu., L. C. in Eq. 474.
(*h*) 3 Term Rep. 561.

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Bk. i, tit. 18, par. 1212. "Under the head of fraud it may be observed that any fraudulent practice (to which the word in the original *chhala* is synonymous) vitiates a contract."—Macnaghten's Principles of Hindú Law, 2nd ed. 121. "When the judge discovers a fraudulent pledge or sale, a fraudulent gift and acceptance, or in whatever other case he detects fraud, let him annul the whole transaction."—Manu. Ch. VIII., v. 165. That the rule of the English law is also to be considered as the law in India, appears from the judgment of the Privy Council in *Doolubdass Pettamberdass* v. *Ramloll Thackoorseydass* (*i*).

Upon the ground, therefore, that the sale to the defendant was not a *bonâ fide* or real sale, and that the shares were knocked down to him at the prices he bid for them, in order to deceive and mislead persons who might wish to purchase shares in the company, or to induce persons to purchase at extravagant and improper prices, I am of opinion that the plaintiffs cannot recover. Such a purpose is illegal: *Rex* v. *De Berenger* and others (*j*).

I have hitherto assumed that the resolution, that 12,500 of the new shares should be sold by auction, was authorised by the articles of association, and was not illegal. If it was not authorised or was illegal, the plaintiffs were not able to deliver the shares in pursuance of the contract,—that is to say, they could not confer upon the defendant a legal title to the shares, which was one of the issues raised.

The 9th clause of the articles of association provides "that all additional capital which shall be raised for the purposes of the company shall be raised in shares numbered progressively, and either in continuation of the numbers of the shares of the previous capital of the company or otherwise, and shall be divided into shares of such amounts as will allow of the whole amount of such additional capital being apportioned amongst the existing shareholders rateably and in proportion to their respective shares in the existing capital of the company; and that the existing shareholders

(*i*) 5 Moore Ind App. 131. (*j*) 3 M. & S. 67.

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for the time being shall have the option of taking and subscribing for the shares in such additional capital rateably and in proportion aforesaid." By the existing shareholders having the option of taking and subscribing for the new shares, I think was meant, that the new shares should be offered to the shareholders in proportion to the shares each then held, and a reasonable opportunity offered to them of exercising the right of taking them.

Whether it was necessary to make the offer by a notice to each shareholder specifying the number of shares to which he was entitled, as is required by Cl. 27 of the Regulations given in the first schedule to the Indian Companies' Act, or it would have been sufficient to have published a general notice calling upon the shareholders within a specified time to state whether they wished to take the shares, it is not necessary to determine, as this was not done. The notice of the meeting, at which the resolution to increase the capital was passed, cannot be considered as equivalent to such a notice; and, although the shareholders who were present at the meeting and voted for the resolution may be considered to have thereby exercised their option, those who did not vote, and still more those who were not present cannot be held to have done so. The 9th clause is imperative and not merely directory, and so long as it was one of the articles of association, a deviation from it could not be made, unless with the assent of every shareholder: *Ex parte Bignold* (*k*).

It was contended by the plaintiffs' counsel that the shareholders had renounced their option, and several cases were cited; but they appear to me to be distinguishable from this case; and in all of them either something had been done, or some benefit had been derived, which amounted to a ratification by, or an equitable estoppel upon, the parties affected by the acts of the directors. Or, as in *Bargate* v. *Shortridge*, there had been a course of dealing by which the parties, who sought to set up the want of observance of the formalities

(*k*) 22 Beav. 143; 25 Law J., Ch. 601.

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required by the deed, were bound. But it may be said that the defendant was himself estopped from objecting that the 9th clause had not been observed, as he attended the meeting and voted for the resolution. And if upon the facts it had appeared that this was a real sale, and that the defendant was aware of the 9th clause, and knowing that the shareholders had not had an opportunity of exercising their option, had purchased the shares, there would be ground for holding that he purchased them with such a title as could under the circumstances be given, and was bound to take them, subject to the risk of any shareholder claiming to exercise his option; but the case must be decided upon all the facts in evidence, and if the plaintiffs seek to treat the transaction as a real sale he may defend himself on the ground that the 9th clause was not complied with.

I do not think it necessary to give any opinion upon the objections which were raised under the 7th and 8th clauses of the articles. If my opinion had been in favour of the plaintiffs on the main questions, I should have been reluctant to give effect to those objections, and I am inclined to think that none of them is sustainable; but I do not decide upon them, and if this case should go before the Court of Appeal it will be competent for the defendant's counsel to rely upon them in support of this judgment.

For the reasons I have above given, I think the defendant is entitled to the judgment of the court, but it is not a case in which he ought to be allowed his costs.

Judgment for defendant without costs.

Attorneys for plaintiffs: *Dallas, Lynch & Langdale.*

Attorneys for defendant: *Kelly & Co.*

Suit No. 307 *of* 1865.

NA'RA'YAN SHA'MJI' and others ..... *Plaintiffs.*
THE GUJARA'T TRADING COMPANY..... *Defendants.*

Suit No. 917 *of* 1865.

MOTI'RA'M DALPATRA'M..... *Plaintiff.*
THE GUJARA'T TRADING COMPANY..... *Defendants.*

Staying of Suits under Act XIX. of 1857, *Sec.* 72—*Civ. Proc. Code Secs.* 284, 287, *and* 288.

In an application under Sec 288 of the Civil Procedure Code to execute an order of a District Court for the winding up of a company, by staying suits which had been filed against the company in the High Court:—

Held: 1*st.*—That the order can take effect only from the time when it is filed in the court to which it shall have been transmitted for the purpose of being executed; and that suits can only be stayed from that time.

2*nd.*—Where the decree in a suit has already been actually executed by the attachment of property of the defendants, although the sum decreed may not have been realised by a sale, there is no longer a suit or action to be stayed within the meaning of Sec. 72 of Act XIX. of 1857.

1866. February 27. O. S. Nos 307 & 917 of 1865.

THIS was an application, under Sec. 288 of Act VIII. of 1859, to execute a decree of the District Judge of Ahmedábád, ordering the winding up of the Company, the head office of which was at Ahmedábád.

The winding-up order was made on the 8th of November 1865, and a copy thereof was transmitted by the District Judge, and filed in the High Court, in accordance with Sec. 287 of the Code. That section provides that the copy of a decree or order for execution, when filed in the court to which it has been transmitted for the purpose of being executed, shall for such purpose have the same effect as a decree or order for execution made by such court; and it was now sought to execute the winding-up order of the District

Judge by staying the above suits (which had been brought against the Company within the original jurisdiction of the High Court at Bombay), in accordance with Sec. 72 of Act XIX. of 1857, which enacted that "After the date of such order or decree for winding up the Company, all suits and actions against the Company shall, if the Court so orders, be stayed."

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Bayley, in support of the application, referred to *In re The Waterloo Life Insurance Co.* (*a*), *In re Keynsham* (*b*), *Thomas* v. *Walls* (*c*), *In re The Western Bank of Scotland* (*d*).

Howard for *Motirám Dalpatrám*.—The sections of the Code, which provide for execution of a decree out of the jurisdiction of the court by which it was passed, do not apply to a case like this. By Sec. 296—"The rules contained in this Chapter (IV.) shall be applicable to the execution of any judicial process for the sale of property or for the payment of money which may be ordered by a Civil Court in any civil proceeding." Sec. 288 would seem to refer only to decrees *inter partes*, and not to an *ex parte* decree of this kind. Besides, the application, so far as the suit of Motírám Dalpatrám is concerned, is made too late; as judgment was recovered on the 10th of November, and the order for attachment issued on the 9th of December. As the property has been seized, the liquidators cannot come in. *Woodland* v. *Fuller* (*e*), *Ex parte Parry* (*f*). The object of restraining proceedings is to prevent suits being brought *malâ fide*.

Cur. adv. vult.

April 5.

COUCH, C.J.:—In the present case the head office of the Company is at Ahmedábád, and the order for winding up was properly made by the court there; but there are many cases where the order for winding up would be made by this court, and the Company would have property beyond the limits of its ordinary jurisdiction, and be liable to be sued in other courts in the Presidency; and it would cause much mischief

(*a*) 9 Jur. N. S. 292. (*b*) *Ibid.*, 885. (*c*) 10 Jur. N. S. 543.
(*d*) 1 DeGex F. & J. 1. (*e*) 11 A. & E. (*f*) 33 Law J. Ch. 245.

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if the decree or order for winding up, and staying suits and actions, could not be enforced by those courts.

Sec. 284 of the Code of Civil Procedure says: "A decree of any Civil Court within any of the British territories in India, or established by authority of the Governor General of India in Council in the territories of any foreign Prince or State, which cannot be executed within the jurisdiction of the court whose duty it is to execute the same, may be executed within the jurisdiction of any other such court, in the manner following;" and Sec. 287 says: "The copy of any decree, or of any order for execution, when filed in the court to which it shall have been transmitted for the purpose of being executed as aforesaid, shall for such purpose have the same effect as a decree or order for execution made by such court."

The decree of the 8th of November 1865 has been transmitted to this court, and is now filed in it; and the only question is, from what period it is to have effect upon suits pending in this court.

I think it can take effect only from the time when it is filed here; and that the suits can only be stayed from that time. Until it was filed, this court could not take notice of it, and the proceedings in the suits were perfectly regular. Sec. 288 says: "When application shall be made to any court to execute the decree of any other court as aforesaid, the court to which the application shall be made or referred, shall proceed to execute the same according to its own rules in the like cases;" and there are no words which would authorise the court to give to the decree a retrospective effect, and treat it as a decree of the court of the date when it was originally made.

In one of the suits in this court, No. 917 of 1865, in which Motírám Dalpatrám was the plaintiff, the decree had, before this application was made, been executed by attachment of property of the defendants, consisting of shares in the Bombay Reclamation Company and the Bank of Bombay, and dividends due from the estate of Behrámjí Hormasjí

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Cáma; but no sale has yet been made. Where the decree has been actually executed by the attachment of property, I think, although the sum decreed may not have been realised by a sale, there is no longer a suit or action to be stayed within the meaning of Sec. 72 of Act XIX. of 1857.

Sec. 231 of the Companies' Act of 1862 in England enacts that "the court may, at any time after the presentation of a petition for winding up an unregistered company, and before making an order for winding up the company, upon the application of any creditor of the company, restrain further proceedings in any action, suit, or proceeding against any contributory of the company, or against the company as hereinbefore provided, upon such terms as the court thinks fit;" and upon this Lord Justice *Knight-Bruce*, in *Ex parte Parry, in re The Great Ship Company (Limited)* (*g*), says:— "Now as to this section, two doubts have presented themselves to my mind: first, whether the section having been concluded by judgment and execution, and there being nothing more to be done in it but to raise the money by sale of the goods, such a case was within the language of this section, according to its true construction; the words being to 'restrain further proceedings in any action, suit, or proceeding against any contributory of the company or against the company.' It has been ably argued, on the part of the appellant, that the execution in this case was not within the provisions of this section; and I am not sure that the argument is not well founded." If this is the true construction of the English Act, still more would it be of the Indian Act, where the only words are "suits and actions," and the more extensive word "proceeding" is not used.

In the decree of the District Court I find this passage: "From this we have come to the opinion that the suits that may have been or may be hereafter brought against this company in Bombay should be stopped till we write again. Therefore, agreeably thereto, we wrote an English letter,

(*g*) 33 Law J. N. S. Ch. 245.

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dated the 16th day of October of the year 1865, to the Honourable the High Court of Judicature in Bombay, whereupon an English letter, dated the 31st day of October of the year 1865, was received from the Acting Prothonotary Sáheb of that court to the effect, that the Judges Sáhebs of the Honourable the High Court could not make any order on the matter stated in our letter; but that any order that we might have passed should be filed in that court by some one of the parties interested, according to the rules of the Civil Procedure Act; and then, should any such party or parties present an application to the court, the Honourable the Judges Sáhebs would pass a proper order thereon."

The order for the attachment in Suit No. 917 of 1865 was made on the 16th of December 1865; and if, instead of adopting the irregular proceeding above mentioned, the Judge had directed the parties before him to proceed according to the provisions of the Code of Civil Procedure, it is probable that the suit would have been stayed before the attachment issued. Making all allowances for the novelty of the proceeding, the act of the Judge appears to show too little regard for the provisions of the law as to the procedure in the courts. But the mistake of the Judge will not authorise me to put a different construction in this than in any other case; and as regards Suit No. 917 the application must be refused.

In the other suit, No. 307 of 1865, in which Náráyan Shámjí and others are plaintiffs, no attachment has issued, and there is nothing to prevent the suit being stayed. As to that suit, therefore, the decree of the District Court is executed, by this court ordering it to be stayed, and that the plaintiff shall be entitled to add to his claim his costs in the suit incurred up to the time of this application.

Attorney for Motírám Dalpatrám: *Khanderáo Moroji.*

Attorney for defendants: *W. H. Thacker.*

Suit No. 275 *of* 1865.

THE FINANCIAL ASSOCIATION OF INDIA AND CHINA (LIMITED)

v.

PRA'NJI'VANDA'S HARJI'VANDA'S and BHAGVA'NDA'S PURSHOTAMDA'S.

[BEFORE THE SITTING JUDGE IN CHAMBERS.]

Act XXVIII. of 1865—*Stay of proceedings—Execution of decrees—Laches—Practice—Equitable mortgage.*

An order, made under Act XXVIII. of 1865 for the winding up of the estate of a trader, not only stays the further prosecution of suits, &c., against him, but also prevents the completion of an execution against his immoveable or ordinary moveable property, if such execution have not been consummated by seizure and sale before the filing in court of the resolutions passed at the meeting of creditors; unless the leave of the court be given to the execution creditor to proceed notwithstanding the winding-up order.

Such leave ought not to be given except upon special grounds.

Laches of the execution creditor will be an obstacle to his obtaining such leave.

Under the Insolvent Debtors' Acts (1 & 2 Vic. c. 110—English repealed Act; 11 & 12 Vic. c. 21, India) the mere delivery of the writ of *fi. fa.* to the sheriff or his deputy for execution, bound the goods as against the assignees in insolvency, although there had been neither seizure nor sale under the writ. The property in the goods passed to the assignees in insolvency, subject to the right of the execution creditor to have satisfaction of his debt by sale. But in bankruptcy the law is otherwise. The execution must be levied by seizure and sale before the date of the fiat or the filing of the petition for adjudication; otherwise the execution creditor is entitled only to a rateable part of his debt with the other creditors.

The practice of the High Court under the Civil Procedure Code on the execution of decrees for money, either against immoveable or moveable estate, has been, in the first instance, to issue a writ of attachment, and subsequently, on its return by the sheriff duly executed, to issue a writ directing a sale. The writ of *fi. fa.*, which issued from the Supreme Court, was an authority to the sheriff not only to seize, but also to sell. Sec. 250 of the Civil Procedure Code applies neither to executions against immoveable property, nor to executions against debts due to the defendant: and in order to give to third parties full opportunity of vindicating their rights before sale, and also to give the defendant an opportunity of paying, it has not been usual to issue process for attachment and sale simultaneously, even against personal property, and it would not seem to be proper to do so, except under special circumstances.

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A SUMMONS had been obtained on the 8th of September 1866, by the plaintiffs, calling upon the defendants and the trustees (under Act XXVIII. of 1865) of the estate of the defendant Pránjívandás Harjívandás, and also the trustees, under the same Act, of the estate of Bhagvándás Purshotamdás to show cause why an order should not be made, under Sec. 242 of the Civil Procedure Code, for the issuing of a warrant of sale, authorizing the sheriff to sell certain immoveable property belonging to the defendant Bhagvándás Purshotamdás, in satisfaction of Rs. 56,000, being the balance due to the plaintiffs under a decree for Rs. 78,296 and upwards, obtained in this cause by the plaintiffs, against both the defendants, on the 4th of August 1865.

Mr. Peile (Messrs. Cleveland & Peile) attended this day on behalf of the trustees of the estate of Bhagvándás Purshotamdás to show cause.

Mr. Bishop (Messrs. Acland, Prentis & Bishop) for the plaintiffs supported the summons

The Sitting Judge took time to consider his decision.

September 24.

WESTROPP, J.—The question raised on the 8th section of Act XXVIII. of 1865 is of considerable importance. The preceding section enacts that a winding-up order, made under the Act, shall relate back to, and take effect from, the filing in court of the resolutions which have been carried at the meeting of creditors. That provision, and the peculiar language of the 8th section, tend strongly to show, that the policy of the Act is, to a great extent, similar to that of the present Bankruptcy Acts in England: Stat. 12 & 13 Vic. c. 106, Secs. 133, 184 (1849); Stat. 24 & 25 Vic. c. 134, Secs. 73, 103 (1861). In *Hutton* v. *Cooper* (*a*) it was held that, under the 184th section of Stat. 12 & 13 Vic. c. 106, a creditor, who has obtained judgment in an adverse action against a bankrupt and has issued a *fi. fa.* thereon, and sold the goods, is not entitled to the proceeds, unless not only the seizure, but the sale also, takes place before the date of the fiat, or filing of the petition for adjudication in

(*a*) 6 Exch. 159.

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bankruptcy. The case of *Woodland* v. *Fuller* (*b*) shows that this was not so under the repealed Insolvent Debtors' Act, 1 & 2 Vic. c. 110. It was there ruled that the mere delivery of the writ of *fi. fa.* to the sheriff or his deputy for execution, bound the goods as against the assignees in insolvency, although there had been neither seizure nor sale under the writ. The property in the goods passed to the assignees in insolvency; but it did so subject to the right of the execution creditor to have satisfaction of his debt by sale. The same principle is involved in the decision recently made in the first five of the suits brought against execution creditors by Mr. Gamble, under the Indian Insolvent Debtors' Act (Stat. 11 & 12 Vic. c. 21), as assignee of Hunt and Monnett's estate (*c*). But in bankruptcy the law is otherwise. The right of the assignees to the bankrupt's property was regarded as dating *primâ facie* from the act of bankruptcy (*d*); and although that rule was considerably modified by the repealed Stat. 2 & 3 Vic. c. 29, and also by the present Statutes 12 & 13 Vic. c. 106, and 24 & 25 Vic. c. 134—which, as *Cockburn*, C.J. says in *Edwards* v. *Scarsbrook* (*e*), were passed to give some degree of protection to execution creditors against acts of bankruptcy—the execution must be levied by seizure and sale before the date of the fiat or the filing of the petition for adjudication, otherwise the execution creditor is entitled only to a rateable part of his debt with the other creditors: *Hutton* v. *Cooper*; *O'Brien* v. *Brodie* (*f*).

The decision of the present Chief Justice, in *Motírám Dálpatrám* v. *The Gújarát Trading Company, Limited* (*g*), turned upon the 72nd section of Act XIX. of 1857, which provides that "after the date of the order or decree for winding up the Company, all suits and actions against the Company shall, if the Court so orders, be stayed." The Chief Justice held that, as that decree had been partly executed by the attachment

(*b*) 11 A. & E. 859. (*c*) 2 Bom. H. C. Rep. 150. (*d*) *Cooper* v. *Chitty*, and the Cases cited in the Notes to it, 1 Smith L. C. 220.

(*e*) 9 Jur. N. S. 537. (*f*) 12 Jur. N. S. 527. (*g*) *Ante* p. 20.

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of property of the defendants, although there had not been a sale, there was no longer a suit or action to be stayed within the meaning of that section; and he referred to a *dictum* of *Knight Bruce*, L. J., in *Ex parte Parry, in re the Great Ship Company, Limited* (*h*), upon Sec. 201 of the Companies' Act of 1862 in England.

The section (201) of the English Companies' Act of 1862, commented upon by *Knight Bruce*, L.J., and also the 85th and 197th sections of that statute, apply to the staying of actions, suits or proceedings *before* the making of an order for winding up the company. All that those sections provide is, that the court may stay actions, suits, and proceedings if it thinks fit. But the 87th section, which applies to a stay *after* the making of a winding-up order, unlike those sections, or Sec. 72 of Act XIX. of 1857, imposes a direct bar. It runs thus: "When an order has been made for winding up a Company under this Act, no suit, action or other proceeding shall be proceeded with or commenced against the Company, except with the leave of the Court, and subject to such terms as the Court may impose." The 108th section of the Indian Companies' Act of 1866 is, omitting the word "action," in precisely the same terms. The 212th section of that Act, protecting contributories of a company registered under Part VII. of the Act, follows the language of the 108th section. The 211th section more nearly resembles the 85th, 197th, and 201st sections of the English Companies' Act of 1866, and, like them, relates only to a stay before the making of the winding-up order. It is unnecessary now to give any opinion as to whether the same rule of construction should be applied to the 108th and 212th sections of the Indian Companies' Act of 1866, as *Knight Bruce*, L.J., seemed disposed to give to the 201st section of the English Companies' Act of 1862, and as *Couch*, C.J., gave to the 72nd section of Act XIX. of 1857. I have mentioned the 108th and 212th sections (which are themselves less favourable to execution creditors than Sec. 72 of Act XIX. of 1857 and Sec. 201 of the Companies' Act

(*h*) 33 Law. J., N. S., Ch. 245.

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of 1862) for the purpose of comparison with Sec. 8 of Act XXVIII. of 1865, and of showing that it goes far beyond them, and accordingly that my decision will conflict neither with the *dictum* of *Knight Bruce*, L.J., as to Sec. 201 of the Companies' Act of 1862, nor with the decision of the Chief Justice on Sec. 72 of Act XIX. of 1857.

Before quoting Sec. 8 of Act XXVIII. of 1865 I shall refer to the Indian Insolvent Debtors' Act, 11 & 12 Vic. c. 21. Its 49th section enacts that if, after the filing of any insolvent's schedule and before he obtain his discharge, "any suit or action shall be pending against the insolvent, his heirs, &c. &c., or any execution or process shall be issued out or issued from any of the said courts, or be enforced against such insolvent, his heirs, &c., for or in respect of any debt, &c., admitted in the schedule of the insolvent, or disputed as to amount only, the said Court in which such action or suit shall be pending, or from which such execution or process as aforesaid shall issue, on proof to its satisfaction that such action or suit, execution or process is in respect of the debt or demand aforesaid, *may* stay the proceedings in such suit or action, so far as the same respects the said debt or demand, until further order of the said Court, and may set aside or suspend such execution or process, so far as the same respects the said debt or demand, until further order of the said Court," &c. In one point that enactment falls short of Secs. 108 and 212 of the Indian Companies' Act of 1866, and Sec. 87 of the English Companies' Act of 1862. It does not declare, as they did, that suits and proceedings shall be stayed, but like Secs. 85, 197, and 201 of the English Companies' Act of 1862 and Sec. 211 of the Indian Companies' Act of 1866, provides that the court, if applied to for that purpose, may stay them. In another point, however, it goes beyond all of those enactments; it not only contemplates, as they did, the stay of actions or suits, but also of "execution or other process."

Sec. 8 of Act. XXVIII. of 1865 is as follows:—"After the date of such order (the winding-up order) all suits or legal proceedings of whatever kind, in respect of such trader's

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civil liabilities, *shall be stayed*, and *no execution, attachment, or other process* against such trader's property in respect of any debt, and no process against his person in respect of any debt, other than such process by writ or warrant as may be had against a debtor about to depart out of the jurisdiction of the Court, shall be *available* to any creditor or claimant without leave of the Court." That section, in providing that the winding-up order shall of itself operate as a stay of suits, &c., and impose a bar upon them, comprises the strong point of Secs. 108 and 212 of the Indian Companies' Act of 1866 and of Sec. 87 of the English Companies' Act of 1862; and by specifying execution, attachment or other process, comprises also the strong point of Sec. 49 of the Indian Insolvent Debtors' Act [11 & 12 Vic. c. 21], and thus takes the present case out of the reasoning which guided *Knight Bruce*, L.J., and *Couch*, C.J., in the cases before them already mentioned. The very strong and peculiar language of Sec. 8, combined with Sec. 7, which, on the making of the winding-up order, vested "all the moveable and immoveable estate and effects" of the trader "and debts due to him," &c., in the trustees, and declared that "such order, when so made, shall, by virtue of this Act, relate back to, and take effect from, the filing of the said Resolutions (for winding up the estate, &c.) in Court as aforesaid, and shall instantly and without any conveyance or assignment vest all the moveable and immoveable estate and effects as aforesaid of such trader in the said trustees," clearly indicate that the policy of Act XXVIII. of 1865 is analogous to that of the Bankruptcy Acts, so far as they regard personal estate; and that, as regards immoveable (real) property, Act XXVIII. of 1865 goes beyond those Acts, because it makes no distinction between executions against immoveable property and executions against moveable property, as Sec. 133 of the Stat. 12 & 13 Vic. c. 106 has done in England. That statute treats execution against the lands and tenements of a bankrupt as perfected by seizure only, whereas it required seizure and sale to perfect execution as against his goods and chattels. The reason, however, for

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that distinction in England is manifest. Execution against the freehold or copyhold lands and tenements of a debtor did not exist at Common Law, and can only be had by seizure under a writ of *elegit*, by virtue, so far as regards freeholds, of the Statute of Westminster the 2nd (13 Edw. 1) c. 18, Stat. 29 Car. 2, c. 3, Sec. 10 and Stat. 1 & 2 Vic. c. 110, Sec. 11; and, so far as regards copyholds, of the last mentioned statute; and cannot be had by sale. Accordingly, the Bankruptcy Consolidation Act (12 & 13 Vic. c. 106) was moulded to meet that state of the law as to the execution of judgments against real estate in England. But in the three Presidency towns of India the charters of the Supreme Courts sanctioned the sale, under a writ of *fi. fa.*, of the real as well as of the personal property of the debtor, and so does the Civil Procedure Code under its process in all parts of India to which it has been extended. Hence Act XXVIII. of 1865 has made no distinction whatever between executions against immoveable and executions against moveable property; and if executions in either case be not completed as well by sale as by seizure, they are stayed by Sec. 8.

It should, moreover, be especially noted, that the language of that section is not simply that execution, attachment, or other process shall not be issuable, but that it shall not be "available" to the execution creditor against the property of the trader. The practice of this court under the Civil Procedure Code on the execution of decrees for money, either against immoveable or moveable estate, has been, in the first instance, to issue a writ of attachment, and subsequently, on its return by the sheriff duly executed, to issue a writ directing a sale. It, therefore, becomes necessary for the execution creditor to come again to the court, after the attachment, and to apply for the aid of its process to compel a sale. This was not so in the Supreme Court. The writ of *fi. fa.*, which issued from that court, was an authority to the sheriff not only to seize, but also to sell. The 250th section of the Civil Procedure Code enacts that "the usual process for attachment and sale, when the property to be attached consists of goods, chattels, or other personal estate,

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other than debts, may be issued either successively or simultaneously, as the Court directing the sale may, in each instance, think proper." That section applies neither to executions against immoveable property, nor to executions against debts due to the defendant. And in order to give third parties, whose property may have been wrongfully taken in execution, as that of the defendant, full opportunity of vindicating their rights before sale, and also to give the defendant an opportunity of paying, it has not been usual to issue process for attachment and sale simultaneously, even against personal property, and it would not seem to be proper to do so, except under special circumstances. As to execution against debts, it will be useful to refer to some of the English cases, in which a conflict has arisen between orders made under what are styled the garnishee clauses in the Common Law Procedure Act of 1854 (Secs. 60 to 65) and the Bankruptcy Acts. *Holmes* v. *Tutton* (*i*) decided that from the time of the service of the order, attaching the debts due to the defendant, it binds those debts in the hands of the garnishee (the debtor to the defendant), but subject to the operation of the Bankrupt Law Consolidation Act, 1849, which, so far as it is unrepealed, must be treated as incorporated with the Act of 1861; and, therefore, if the defendant become bankrupt before the debt is paid under the order, the debt passes to the assignees, and the attachment fails. *Tilbury* v. *Brown* (*j*) decides that the bankruptcy of the defendant, after an order for payment, under Sec. 63 of the Common Law Procedure Act of 1854, has been served on the garnishee, but before actual payment, in effect discharges the order. In the recent case of *Wood* v. *Dunn* (*k*), decided in November 1865, it was held that it is no answer to an action, by trustees of a deed under Secs. 192 and 197 of the Stat. 24 & 25 Vic. c. 134 (Bankruptcy Act 1861), for a debt due to the insolvent trader, that the debtor, to avoid execution under a garnishee order, has paid the debt to the judgment creditor, in obedience to the order, *after* registration of the deed, and with notice of it. The court,

(*i*) 5 E. & B. 65; 24 Law J., N. S., Q. B. 346.
(*j*) 30 Law J., N. S., Q. B. 46. (*k*) Law Rep. 1, Q. B. 77.

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moreover, seemed to think that the payment would have afforded no defence even if made without notice. Mr. Justice *Mellor* said, " We must give effect to the provisions of the Bankruptcy Act, and they operate on the order absolute just as in the case of an order *nisi*." Mr. Justice *Lush* said that it " must be taken as settled law that if the bankruptcy intervenes at any time before the garnishee has paid over the money, the attachment must lapse, and the judgment creditor must come in with the other creditors and take his share of the assets. By the 197th section of the Bankruptcy Act, 1861, the registration of a deed for the benefit of creditors is equivalent to a bankruptcy, and the trustees have all the rights of creditors' assignees in bankruptcy. The plea to be a good plea, in my judgment, ought to show that the payment was made under the garnishee order prior to the registration of the deed,—that is, before that which is equivalent to a bankruptcy. It has been contended that payment after the registration of the deed, but without notice of it, would be good. As at present advised I cannot assent to that proposition." Although the present case is an attachment of immoveable property, and not of a debt due to either of the defendants, yet garnishee cases being of daily occurrence here before the Sitting Judge, and as the English garnishee cases very clearly illustrate the policy of the Bankruptcy Acts, so strongly resembling that of Act XXVIII. of 1865, it seemed desirable to refer to those cases with some particularity.

In the present case, the order for the attachment against certain immoveable property of the defendant Bhagvándás Purshotamdás, situated in Marine Street and Apollo Street in the Fort of Bombay, was dated on the 15th of May last; and the attachment under it (by way of prohibitory order, under Sec. 235 of the Civil Procedure Code) was dated and issued on the 18th of May, and executed on the 2nd of July last. On the 28th of the same month an order was made under Act XXVIII. of 1865 to wind up the estates of the defendant Bhagvándás Purshotamdás and of his partner in trade, one Pránjívandás Tulsídás, pursuant to resolutions

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agreed to at a meeting of their creditors held on the 24th of the same month. No sale has yet been made under the attachment of the immoveable estate of the defendant Bhagvándás Purshotamdás. The Judge's summons now under consideration, dated on the 8th of September 1866, is in the nature of an order *nisi*, calling on the defendants, and the trustees of the estate of the defendant Bhagvándás Purshotamdás under Act XXVIII. of 1865, and the trustees of the estate of the other defendant Pránjívandás Hurjívandás under the same Act, (to wind up whose estate an order has been made on the 11th of August 1866) to show cause why the immoveable property of Bhagvándás, which has been attached, should not be sold, and the proceeds of sale paid over to the plaintiffs. According to the construction which I place upon Secs. 7 and 8 of Act XXVIII. of 1865, the execution being imperfect, and no sale having been made, the suit and all further execution, attachment, or other process to enforce the decree, made in it, against the property of the defendant Bhagvándás Purshotamdás are absolutely stayed by the order of the 28th of July 1866, which order relates back to the 25th of July 1866, when the resolutions passed at the meeting of his creditors were filed in court. So, too, is all process against his person, except a writ of *ne exeat jurisdictione*, on a sufficient case being shown for the issue of such a writ. The concluding part of the 8th section empowers the court to remove the bar and to permit a plaintiff to proceed against the property or person of the trader. But to give such leave in ordinary cases would frustrate the just and equitable policy of the Act, which is the distribution of the assets of the trader amongst all of his creditors rateably without preference of any one or more over the others. There should, therefore, be some special equity or ground shown in order to induce the court to allow a creditor to proceed against the property or person of the trader.

I have had an opportunity of consulting the Chief Justice and Sir Joseph Arnould as to the effect of a winding-up order under Act XXVIII. of 1865, and understand them fully to concur in the opinion, that such an order prevents the completion

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of an execution against immoveable property or ordinary moveable property, if it has not been consummated by seizure and sale before the filing in court of the resolutions, unless the leave of the court be given to the execution creditor to proceed; and that such leave ought not to be given except under special circumstances.

The remaining point is, whether any such special circumstances exist in this case as ought to induce the court to deviate from what should be its ordinary rule.

This suit, brought to recover a balance of Rs. 75,000 and interest, due upon a joint promissory note of the defendants, dated the 9th of January 1865, for Rs. 1,50,000, payable to the plaintiffs or their order on demand, was commenced upon the 31st of May 1865. The consideration for the note had been wholly received by the defendant Pránjívandás Hurjívandás, the defendant Bhagvándás Purshotamdás, although ostensibly and in point of law a principal, being in truth a surety only. Pránjívandás Hurjívandás, previously to the institution of the suit, had, on the 10th of April 1865, (a fact admitted on both sides) deposited with the plaintiffs, title-deeds to certain immoveable property belonging to him, as security for the debt. On the 8th of June 1865 he presented a petition for the benefit of the Insolvent Debtors' Act. An order vesting his property in the Official Assignee was made on that day. On the 29th of June 1865 he filed his schedule, and subsequently, on one or more occasions, amended it. His petition was dismissed on the 2nd of October 1865. Subsequently, in the same month, the Bank of Bombay, in a suit against him, attached the immoveable property of which he had deposited the title-deeds with the plaintiffs. On the 6th of July 1865, the defendant Bhagvándás Purshotamdás deposited with the plaintiffs, as security for his liability on the promissory note, title-deeds of that portion of his immoveable property as to which the present summons has been issued, upon the terms contained in a letter of that date addressed to him by the manager of the plaintiffs' Association, who thereby undertook that if the Association should obtain a decree for the balance of Rs. 75,000 due to them

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on the note, all due diligence should be used on the part of the Association to make available its lien on the property of the defendant Pránjívandás Hurjívandás by sale of the property or otherwise as might appear competent, and out of the proceeds to apply a sufficient part, or the whole, towards payment of the amount of the decree, and before it should be put in force against the defendant Bhagvándás Purshotamdás or his property. The officiating manager, in that letter, stipulated, 1st, that if the titles of the said properties should not be approved by the Association's solicitors, or if a mortgage for Rs. 75,000 were not executed by Bhagvándás to the Association, the undertaking should be of no avail; 2ndly, that if the Association were unable, within four months, legally to dispose of the property of Pránjívandás Hurjívandás, or otherwise to make it available towards liquidation of the debt of Rs. 75,000, "the said obligation" should be of no avail, but the Association should be at liberty to proceed against Bhagvándás and his properties for the recovery of that debt, in such manner as they might think advisable.

A point in dispute has been, whether the four months began to run from the date of the letter (6th July 1865), or the date of the making of the decree (August 4th, 1865), or of its being sealed (February 8th, 1866). In my view of the case it is not a very material question, but I am inclined to think that the sealing of the decree is the proper terminus from which the time should run, otherwise the defendant Bhagvándás would have been completely at the mercy of the plaintiffs. For them it has been argued that they have used all due diligence to make their lien on the property of the first defendant, which they regard as an equitable mortgage, available for payment of the debt; but that by reason of his insolvency they were prevented from doing any thing more than applying, as they did on the 18th of August 1865, by letter to the Official Assignee, to concur in a sale of that property, and that he not having given his concurrence, they were helpless. When Mr. Smith, the plaintiffs' manager, on the 6th of July 1865, on behalf of the

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plaintiffs, undertook to use all due diligence to realize the amount of the debt out of the estate of Pránjívandás Hurjívandás, he must have been fully aware that Pránjívandás had filed his petition in the Insolvent Court nearly a month before; and ought, therefore, to have been then alive to any difficulties which that insolvency might occasion in proceedings to render the equitable mortgage of that defendant's property effective. Mr. Smith must be regarded as having given his undertaking, and Bhagvándás as having accepted it, upon the assumption, that it was perfectly possible, by due vigilance and activity, to procure a sale of that property within the specified time. Otherwise the letter of the 6th of July 1865 would have been nothing save an unworthy stratagem to induce Bhagvándás to part with his title-deeds—a conclusion to which the court would be most reluctant to come. These reasons and the reference in the letter itself to the expected decree render it more probable that the four months were intended to run from the time the decree was in a condition when it could be executed, than from the date of the letter. And it should not be overlooked that there was not any obligation on the part of Bhagvándás, a mere surety, while the suit was yet pending, and in anticipation of a decree, to deposit the title-deeds of his own property to secure the debt of the principal debtor, already secured as it was by a deposit of title-deeds by the latter. Bhagvándás was, therefore, perfectly entitled to insist upon fair terms and a sincere observance of them.

There was not, in my opinion, any *bonâ fide* effort on the part of the plaintiffs to carry out their undertaking to use due diligence against the property of the principal debtor. The letter of the 18th of August was an attempt so faint as to be scarcely appreciable. If they be right in asserting that the four months began to run from the date of the letter, the more earnest diligence did it behove them to use. They might, immediately on giving the undertaking of the 6th of July, have applied for leave to amend their plaint, and might then have recast it by setting forth the alleged equitable mortgage to them by the

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defendant Pránjívandás which had been made on the 10th of April 1865, and have prayed a sale, or might have asked leave to file a supplemental written statement, making that case and asking similar relief; and, if the Official Assignee resisted them, ought to have made him a party defendant In fact, the power of the court, under the 49th section of the Insolvent Debtors' Act, was not invoked by the Official Assignee, and the suit was not stayed. Notwithstanding the insolvency of the defendant Pránjívandás, the plaintiffs were allowed to proceed without interruption to judgment against both defendants, and accordingly obtained a decree against them on the 4th of August 1865, two months before the dismissal of his petition. They tarried for another month,—that is to say, until the 5th of September,—before they lodged their bill of costs for taxation. No delay occurred in the taxing office. The allocatur was signed for the costs on the 8th of September by the Taxing Master The plaintiffs had then, by most unnecessarily slow degrees reached the stage at which they might have had their decree formally drawn up, and sealed, and carried into execution However, what they did was to fold their hands and slumber for nearly five months. On the 30th of January 1866 they appear to have awoke, and bespoke the decree in the Prothonotary's office. They received it thence, duly drawn up and sealed, on the 8th of February 1866. From that day to the present they have never attempted, by execution or otherwise, to enforce their claim against the immoveable property of the defendant Pránjívandás Hurjívandás. And this is what they describe as a performance of their engagement to use due diligence. While the plaintiffs were thus wasting time, the petition of the defendant Pránjívandás was dismissed by the Insolvent Court on the 2nd of October 1865; and instead of being then ready with a decree, founded on their equitable mortgage, for the sale of his immoveable property, or, (even if they had not, as they might have, reconstituted their suit for that purpose) instead of being ready with a common execution upon their money decree, as they easily might have been, they allowed the Bank of Bombay to take the lead of them, and in October to

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attach the same property of Pránjívandás Hurjívandás, upon which the plaintiffs claim to have an equitable mortgage. The pretence that his insolvency delayed them is perfectly idle. The court could not, and would not, have prevented any *bonâ fide* equitable mortgagee from taking the necessary steps to enforce his security against the Official Assignee.

The plaintiffs contend that as Bhagvándás has not executed in their favour a formal legal mortgage for Rs. 75,000, as stipulated in the letter of the 6th of July 1865, he is not entitled to the benefit of their promise to proceed in the first instance against the property of the defendant Pránjívandás. The defendant Bhagvándás, however, has sworn that he was always ready to execute such a mortgage, and that a draft of it was actually approved, on his behalf, by his solicitors. The plaintiffs, however, subsequently agreed that he should substitute for it a mortgage which was to secure, not only the Rs. 75,000, but also a fresh advance which they were to make to him—an arrangement which seems to me to amount to a waiver, by the plaintiffs, of the condition, in the letter of the 6th of July 1865, as to the execution of the mortgage for Rs. 75,000. But, even assuming that there was not any such waiver, the plaintiff must have been perfectly aware that the investigation of the title of the additional property, which was to be associated in the new mortgage together with the property of which Bhagvándás had already deposited with them the title-deeds, was a matter which must occupy time. Even supposing that it did occupy a longer time than it ought to have done, that delay—which occurred at an advanced stage of the relation of the plaintiffs with Bhagvándás—could not excuse the previous failure of the plaintiffs to use any diligence whatever in enforcing payment of the debt against the property of the defendant Pránjívandás. The execution of the mortgage was not a condition precedent to the exhibition of diligence by the plaintiffs in carrying out their part of the arrangement of the 6th of July 1865. They have been the first to infringe the treaty into which they entered with the

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defendant Bhagvándás, and cannot be allowed to complain that he has subsequently failed to perform the condition which lay upon him. Their laches—whether the four months are to be considered as running from the date of the letter (6th July 1865) or from the sealing of the decree—has been so great and so inexcusable that they have no grounds whatever for claiming the aid of the court in removing the bar which, under Sec. 8 of Act XXVIII. of 1865, the winding-up order has imposed upon the completion of their execution.

I have dealt with this case as a question of execution only, of a common money decree. I do not undertake to say, nor am I now called upon to decide, whether the plaintiffs have lost their lien, created by the deposit of title-deeds, on the property of Bhagvándás, which they have seized under their execution, and now seek to have sold—whether, in fact, their laches has been so great as to disentitle them to relief as equitable mortgagees. The duty which lies upon those who seek equity to show that they have done equity, and the signal laches of the plaintiffs, equivalent, in my opinion, to something very like direct breach of contract—circumstances which have weighed most powerfully with me on the present occasion—will probably constitute serious difficulties in obtaining any such relief. It should be borne in mind that the contest is not now between the plaintiffs and Bhagvándás, but is between the plaintiffs and the trustees of his estate, who represent all his creditors. In *Jacobs* v. *Latour* (*l*) *Best*, C. J., said, "As between debtor and creditor the doctrine of lien is so equitable that it cannot be favoured too much; but as between one class of creditors and another there is not the same reason for favour." And in that spirit the Bankruptcy Acts and Act XXVIII. of 1865 have been penned. *Jacobs* v. *Latour* was a case in which a simple lien on goods, not a deposit by way of security for a loan, was held to be waived by their having been taken in execution by the party entitled to the lien. As to the difference be-

(*l*) 5 Bing. 132.

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tween an ordinary lien and a deposit by way of security for a loan, the remarks of Sir V. *Gibbs*, C.J., in *Pothonier* v. *Dawson* (*m*) may be advantageously consulted; and, as to how a lien may be lost, *Weeks* v. *Goode* (*n*).

It is sufficient, however, at present, to allow the cause shown against the summons praying a sale in execution, and to discharge the attachment laid on the property of the defendant Bhagvándás Purshotamdás mentioned in that summons.

(*m*) Holt's N. P. Ca. 383, quoted in *Legg* v. *Evans*, 6 M. & W. 36.
(*n*) 6 C. B., N. S., 367.

NOTE.—*Wood* v. *Dunn*, mentioned at page 32 in the above judgment, has been since reversed in the Exchequer Chamber. Law Rep. 2 Q. B. 73. That Court held that though the deed, in that case executed for the benefit of creditors under the Bankruptcy Act of 1861, was, when registered, equivalent to an adjudication of bankruptcy, yet that the payment by the defendant (the garnishee) to the execution creditor made after the registration of the deed must, on the true construction of the plea, be regarded as having been so made by the garnishee, either without notice of the deed, or, if with notice, under such circumstances that he was unable to get the order to pay set aside before he was compelled to pay to save execution being actually levied; and that in either case the payment was a protection to the garnishee as made under the order of a Court of competent authority. That decision of the Exchequer Chamber does not, however, in any respect conflict with the ruling of the Sitting Judge in the case in the text. The Exchequer Chamber was of opinion that the plaintiffs in *Wood* v. *Dunn* (the assignees under the bankruptcy deed) had only mistaken their remedy in suing the garnishee, and trying to compel him to pay again the debt, which he had already, under the circumstances set forth in the plea, paid to the execution creditor, and that they (the assignees) ought to have brought their suit against the execution creditor, who, when a bankruptcy has supervened after the order to the garnishee to pay, but before he has paid, is precluded by the policy of the Bankruptcy Laws from retaining the money, if subsequently paid to him (the execution creditor) by the garnishee, as against the assignees, and is only entitled to be paid rateably with the other creditors. It should also be carefully noted that the Exchequer Chamber expressly declined to give an opinion "that it would be safe for a garnishee, having been served with an order to pay, and afterwards, before payment, receiving notice of a bankruptcy or a trust deed, after that to pay under the order without an immediate threat of execution, and without taking steps himself to get the order set aside, or giving notice to the assignee informing him that he (the garnishee) should pay, unless the assignee got the order set aside."
—ED.

In re PESTANJI CURSETJI SHROFF, and ACT XXVIII. OF 1865.

[BEFORE THE SITTING JUDGE IN CHAMBERS.]

Books of Account—Seizure—Practice.

Books of account cannot be taken in execution.

1866. September 21. *In re* PESTANJI CURSETJI SHROFF.

IT was brought to the notice of the Sitting Judge (Mr. Justice Westropp) that an attempt had been made by a Sheriff's officer to seize the books of account of the insolvent, which had been produced at a meeting of his creditors, held under Act XXVIII. of 1865.

His Lordship asked the Deputy Sheriff whether he could refer to any authority or rule of Court, showing that a judgment creditor had a right to seize the books of account of his debtor; and that officer stated that such had been the practice of the Sheriff's office for several years.

His Lordship said that he had a strong impression that such seizure was illegal: but that he would look into the authorities and consider the matter.

September 24. WESTROPP, J. :—I have considered this matter and looked into the law on the subject, and am confirmed in the view which I expressed a few days ago. It was held in *Francis* v. *Nash*, quoted in Comyn's Digest: 4th Ed. by Kyd, Title Execution, C. 4, that at Common Law nothing that cannot be sold, as deeds, writings, bank-notes, &c., can be taken in execution. The same doctrine is also to be found in 2 Arch. Pr. by Prentice, p. 642, Ed. 1852; and in *Legg* v. *Evans* (*a*).

In England that rule has been relaxed by legislation. The Statute 1 & 2 Vict., c. 110, Sec. 12, empowered the Sheriff to seize any money or bank-notes, cheques, bills of exchange, promissory notes, bonds, specialties, or other securities for

(*a*) 6 M. & W. 36.

money, belonging to the person against whose effects a writ of *fi. fa.* should be sued out; but even since that statute, deeds and writings, &c., cannot be taken, unless they be securities for money within the meaning of the statute. For instance, a title-deed (even, it would seem, if pledged with the debtor) or a letter, or a guarantee for some collateral act, or any other deed or writing which could not form the foundation of an action by the debtor himself for a specific sum of money, cannot, it is said, be taken (2 Arch. Pr. by Prentice 643).

Under the Civil Procedure Code, monies, bank-notes, cheques, bills of exchange, promissory notes, government securities, bonds or other securities for money, may be taken in execution; but I do not find in that Code anything which would warrant, in my opinion, the seizure in execution of other deeds or writings, account books, or other things of a like unsaleable nature. The words, "all other property whatsoever, moveable or immoveable, belonging to the defendant," contained in that section, must be restrained by the fact that the execution, contemplated by the Code against property, (except in the case of a decree for delivery of possession of land or of any specific moveable: Secs. 199, 200, or in the case of debts Secs. 241, 242, 243, or of rents Sec. 243,) is execution not by attachment only, but by attachment and sale: Secs. 201, 205. Hence anything, which is not in its nature saleable, and not expressly provided for, would seem not to fall within the scope of the 205th section, howsoever comprehensive its language may, at first sight, appear. It has been suggested that deeds, writings, and account books might be sold as waste paper, but such a proceeding would be more in the nature of a wilful destruction of property, than of a *bonâ fide* sale, such as was intended by the framers of the Code. In the absence of any express legislation, rendering books of account liable to seizure and sale, I think that the Common Law rule of exemption should be applied to them.

I should have been very much surprised to have found any

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legislation sanctioning the seizure of books of account; as such a proceeding must be productive of great inconvenience and injustice, and would greatly injure defendants in conducting their business. In England, no man can be distrained for rent by the utensils of his trade, as for instance the axe of a carpenter, the book of a scholar, or the materials for making cloth in a weaver's shop: Bacon's Abridgment, Title, Distress, B—a rule which, to a certain extent, has been applied by the Legislature in England to executions. The Statute 8 & 9 Vict., c. 127, Sec. 8, after reciting that it is expedient to protect the actual necessaries of, or belonging to, judgment debtors from being seized in execution, enacts that the wearing apparel and bedding of any judgment debtor, or his family, and the tools and implements of his trade, if they do not exceed in value £5, shall not be liable to seizure under any execution or order of any court against his goods and chattels.

It is easy to conjecture how the practice of seizing books of account has arisen in Bombay, which practice has not, however, to my knowledge ever received the sanction of the Supreme Court or of the High Court. The Charter of the Supreme Court allowed (as does the Civil Procedure Code) the seizure of debts due to the defendant; and execution creditors had, in all probability, put the Sheriff in motion against the books, in order that they might ascertain from them what debts were due to the defendant. But the execution creditor had no right whatever to make use of the property of the defendant. He had as little right to make use of his account-books as to ride upon his horse or in his carriage. Upon a *fi. fa.* the Sheriff cannot deliver the defendant's goods to the plaintiff in satisfaction of his debt, but the goods are to be sold. If the Sheriff on a *fi. fa.* levy the goods and pay the plaintiff with his own proper money, yet he cannot keep the goods to his own use, for the authority by which he acted was to sell the goods: Bacon's Abridgment—Title, Execution, C. 4; and Title, Sheriff, N. 5.

I have brought this matter to the notice of the Chief Justice, who fully concurred with me in thinking that the

account books of a defendant are not liable to seizure or sale. I have not had an opportunity of fully consulting the other Judges sitting on the Original Side of the Court on the subject; but I have mentioned it to them, and have no reason to suppose that they entertain a different opinion. It is desirable that the Sheriff should henceforth refrain from taking books of account in execution

1866. September 24. *In re* PESTANJI CURSETJI SHROFF.

Original Suit, No. 372 *of* 1866; *Appeal, No.* 88.

THE GU'JARA'T TRADING COMPANY (LIMITED). *Appellants.*

TRIKAMJI' VELJI' and others trading as Trikamjí Veljí and Company ..... *Respondents.*

Indian Companies' Acts of 1857 *and* 1866—*Illegal contract—Repeal.*

In a suit filed on the 28th of April 1866, and brought by a Joint Stock Company, after registration, to recover damages for breach of a contract made with the defendants before registration:—

Held (by *Couch*, C. J., and *Arnould*, J., affirming on appeal the decree of *Sárgent*, J.) that the contract was illegal under Sec. 2 of Act XIX. of 1857, and that the plaintiffs could not sue upon it.

Where the law is altered while a suit is pending, the law as it existed when the action was commenced must decide the rights of the parties; unless the Legislature, by the language used, shew a clear intention to vary the mutual relations of such parties.

1866. Oct. 5, 8, 9, Nov. 27. O. S. No. 372 of 1866.

THE Original Suit (No. 372 of 1866) was brought by the Official Liquidators of the Gújarát Trading Co., latély carrying on business at Ahmedabád and also in Bombay, but now under liquidation, by an order made by the District Court at Ahmedabád and filed in the High Court (*a*); and was heard by Sir Charles SARGENT, sitting in a Division Court, on the 5th, 8th, and 9th of October 1866.

The plaintiffs sought to recover from the defendants the sum of Rs. 48,400, with interest thereon at 9 per cent. from the 1st of July 1865, in specific performance of an agreement in writing made between the plaintiffs and the defendants on the 18th of March 1865, for the purchase and sale of a share in the Bombay Reclamation Co., Limited, which the

(*a*) *Ante* p. 20.

1866. Oct. 5, 8, 9, Nov. 27. O. S. No. 372 of 1866. plaintiffs were ready and willing to deliver, but which the defendants had refused to accept. And the plaint was amended, at the trial, by praying for damages, in the event of specific performance not being granted.

Sir Charles SARGENT, on the 27th of November, gave judgment for the defendants with costs, on the ground that the plaintiffs could not sue upon the contract in the plaint mentioned, as the same was void by reason of its having been entered into before the plaintiffs' Company was registered and at a time when it was an illegal association.

Appeal, No. 88. The grounds of objection taken to the decree on appeal were as follows:—(1) That the contract in the plaint mentioned was not a void or illegal one; (2) that the said contract was not rendered invalid by Sec. 2 of Act XIX. of 1857 of the Legislative Council of India, and was not made in contravention of that or any other Act; (3) that the said contract was one upon which the plaintiffs were entitled to sue; (4) that the said decree was against the weight of the evidence; (5) that the said decree was contrary to law, equity, justice and right; (6) that the Judge ought to have found all the issues in favour of the plaintiffs with costs.

1867. January 18. The appeal was heard before COUCH, C.J., and ARNOULD, J.

The Advocate General (*Hon'ble L. H. Bailey*) and *Howard* for the appellants.

Scoble, McCulloch and *Green* for the respondents.

The following authorities were cited in the course of the argument:—*Cope* v. *Rowlands* (*b*); *Foster* v. *Bates* (*c*); *Langton* v. *Hughes* (*d*); *Surtees* v. *Ellison* (*e*); *R.* v. *McKenzie* (*f*); *R.* v. *Denton* (*g*); *Ex parte Grisewood and Smith* (*h*); 1 Lindley on Partnership, 149; *Khatáo Ladhá* v. *The Bombay Reclamation Co.*; Act XIX. of 1857 and Act X. of 1866.

Cur. adv. vult.

February 21. COUCH, C.J.:—In this case we expressed our opinion, in the course of the argument, that we considered the learned Judge was right in deciding, upon the construction of Sec.

(*b*) 2 M. & W. 149. (*c*) 12 M. & W. 226. (*d*) 1 M. & S. 593.
(*e*) 9 B. & C. 750. (*f*) R. & R. 429. (*g*) 18 Q. B. 761.
(*h*) 28 Law J., N. S., Ch. 769.

1867. February 21. Appeal, No. 88

2 of Act XIX. of 1857, that the contract was illegal and that the plaintiffs could not sue upon it; and the point which remained to be considered—and which Mr. Howard raised on the part of the appellant—was that Act XIX. of 1857 had been repealed by Act X. of 1866 (the Indian Companies' Act).

Now, it appears that the plaint in this suit was filed on the 28th of April 1866, and Act X. of 1866 came into operation on the 1st of May; and therefore, at the time of the commencement of the suit, Act XIX. of 1857 was the Act which was in force. And I am of opinion, in accordance with the judgment of the Court of Queen's Bench, in *Hitchcock* v. *Way* (*i*) that where the law is altered while an action is pending, the law as it existed when the action was commenced must decide the rights of the parties; unless the Legislature, by the language used, shew a clear intention to vary the mutual relations of such parties.

In the present case, Act X. of 1866 in Sec. 220, far from showing any clear intention to vary the mutual relation of the parties under the previous law, indicates an intention that the relation should be preserved; because,—without going to the extent of saying that the right which the party has to defend himself, in a suit brought upon the contract, on the ground that it was illegal, is a right or privilege acquired under the repealed Act,—the introduction of that provision by the Legislature, in repealing the former Act, shews an intention that the relation of the parties should be preserved.

We think, therefore, that notwithstanding Act XIX. of 1857 has been repealed, the rights of the parties in this suit must be governed by it; and consequently that the point, which was very ingeniously and ably raised by Mr. Howard, fails.

Then the other question which remained to be considered was, whether—as we were asked to do by the learned Advocate General—we should enable the parties, now that the law has been altered, to avail themselves of that alteration, and give leave to withdraw the suit and to bring a fresh one.

(*i*) 6 A. & E. 943.

1867. February 21. Appeal, No. 88.

In considering whether we ought to do this, it is important to observe what appears to have been the intention of the Legislature when it repealed Act XIX. of 1857; and I am not at all certain that if the question were raised in a new suit, I should not come to the conclusion (and I believe my learned brother concurs in what I say) that the case came within the words "right or privilege acquired by the Act." It is a right to resist the performance of the contract, or to insist upon the illegality of the transaction, which would seem to come within the word "right." At all events it is so exceedingly doubtful whether that would not be so—and the intention of the Legislature appearing to be not to interfere with the status of the parties under the former law—that I think we should not be acting properly if we allowed a fresh suit to be brought for the purpose of raising that question, the result of which, to say the least, would probably be in favour of the defendants.

I am, therefore, of opinion that the decree of the Court below must be confirmed with costs.

ARNOULD, J.:—I entirely concur in every respect.

Decree affirmed with costs.

Attorney for plaintiffs: *C. Tyabji.*

Attorneys for defendants: *Kelly & Co.*

NOTE.—The following sections of the Acts are material:—

Sec. 2.—Not more than twenty persons shall, after the first day of January 1858, carry on in partnership, in any part of the territories in the possession and under the Government of the East India Company, any trade or business having gain for its object, unless they are registered as a Company under this Act, or are authorised so to carry on business by an Act of Parliament, or by Royal Charter or Letters Patent, or by an Act of the Governor General of India in Council; and if any persons carry on business in partnership contrary to this provision, every person so acting shall be severally liable for the payment of the whole debts of the partnership, and may be sued for the same without the joinder in the action or suit of any other members of the partnership.—*Act XIX. of* 1857.

Sec. 219.—After the commencement of this Act there shall be repealed the several Acts specified in the third Schedule hereto.

Sec. 220.—No repeal hereby enacted shall affect—

(1.) Anything duly done under any Acts hereby repealed: (2.) The incorporation of any Company registered under any Act hereby repealed: (3.) Any right or privilege acquired or liability incurred under any Act hereby repealed: (4.) Any penalty, forfeiture, or other punishment incurred in respect of any offence against any Act hereby repealed: (5.) Table B in the Schedule annexed to Act No. XIX. 1857 or any part thereof, so far as the same applies to any Company existing at the time of the commencement of this Act.—*Act X. of* 1866.

Original Suit No. 294 of 1865; *Appeal No.* 65.

FRA'MJI' BOMANJI' .....*Plaintiff and Appellant.*
HORMASJI' BARJORJI' ..... *Defendant and Respondent*

Right to appeal from decision of two Judges in Original Civil Jurisdiction—Alteration introduced by Amended Letters Patent.

Where two Judges decided a case of Original Civil Jurisdiction under the Original Letters Patent; but the decree was sealed and the appeal preferred after the Amended Letters Patent had come into operation:—

Held **that the right of appeal to the High Court—constituted so as to hear an appeal from two Judges—which existed in such a case, under Sec. 14 of the old Charter, was taken away by Sec. 15 of the new Charter, as there was no reservation therein that parties should retain any right of appeal, which existed before its publication, in respect of suits then pending, of judgments given, or of decrees made, but not executed.**

A right of action is not taken away by a change in the law, unless by express enactment; but in the case of mere procedure, unless something is said to the contrary, the new law, where its language is general in its terms, applies without reference to the former law or procedure.

1866.
August 2
Appeal No. 65.

THIS was an Appeal from the decision of Sir M. R. SAUSSE C.J., and Sir JOSEPH ARNOULD, J., who gave judgment for the defendant, on the 7th of June 1865, in the Original Suit (No. 294 of 1865), which was brought to try the plaintiff's right to the possession of property in Bombay of the value of Rs. 50,000; and the preliminary question to be now decided by the Appeal Court (consisting of Sir R. COUCH, C.J., NEWTON and SARGENT, JJ.,) was whether, the Amended Letters Patent of December 1865 having come into operation before the sealing of the decree in the original suit, the High Court had jurisdiction to hear an appeal in accordance with the practice as regulated by the old Letters Patent, which were in force when the suit was heard and decided.

Pigot, for the appellant, contended that it could not have been the intention of the Legislature to cut off the right of

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appeal which parties enjoyed, at the time when the Amended Letters Patent were published, in respect of suits disposed of before the date of their publication. If Sec. 15 of the new Charter were to be read with that strictness which would prevent the plaintiff from appealing to this Court, the same words would take away all appeals of the same kind pending but not yet heard; as there was no saving with respect to them. The fact that there was no saving clause on the subject favoured a more liberal construction of the Charter; and presented an argument that the Legislature did not intend to interfere with the right to bring an appeal, or to hear an appeal already brought, under the old Charter.

Green for the respondent.—The only section of the new Charter which gives an appeal in a case like the present is, in its plain and unmistakeable language, against the form of appeal here contended for.

COUCH, C. J.—In this case, which is an appeal against a decree made by the late Chief Justice and Sir Joseph Arnould,—a decree which was sealed in May 1866, after the present Letters Patent constituting the High Court were published and had come into operation,—the question is, whether the appellant has a right to appeal to the High Court, by which is meant a Court of Appeal of the High Court constituted so as to hear an appeal from two Judges, under the practice which was regulated by the old Letters Patent; or whether that right of appeal is taken away by the new Letters Patent, and the only appeal which the party now has is an appeal to the Privy Council: so that in a case where the amount was under the appealable value in regard to appeals to the Privy Council (which, however, is not the case here) there would be no appeal whatever.

Now, this, as was stated by the learned counsel for the appellant, is a question of procedure. A new Charter has, in respect of appeals, substituted a different procedure for the procedure under the old Charter; and it is important to

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consider that such is the real nature of the question. In construing a Charter of this kind the Court should, I think, be guided by the rules and principles upon which Acts of Parliament are construed: and we have not been favoured by the learned counsel with any decisions of the Courts with regard to the mode in which Acts of Parliament regulating procedure ought to be construed; nor has any case whatever been cited to us in reference to the subject.

But the rule is very clearly stated in *Wright* v. *Hale* (*a*) in which there was disclosed what might be described as a case of hardship—what might possibly be as well entitled as the present case to be described by the learned counsel as involving an injustice if the appellant were not allowed an intermediate appeal from two Judges of this Court to three Judges, before going to the Privy Council.

In the case referred to the question was this: A party had commenced an action before the Common Law Procedure Act came into operation, and was entitled if he succeeded in that action to recover his costs under the then existing law; but the Common Law Procedure Act enacted that when a plaintiff in an action for an alleged wrong recovered by the verdict of the jury less than £5, he should not be entitled to costs in case the Judge should certify that the action was not really brought to try a right; and a power was thus vested in the Court, in regard to cases brought before the Common Law Procedure Act came into operation, to certify that the plaintiff should not have his costs in a certain event, although by the state of the law when he brought his action he was entitled to have his costs, and although he might have commenced proceedings in the full expectation that he would have those costs if he succeeded. The question before the Court in that case being, whether this provision was to have a retrospective effect, and was to apply to actions brought before the passing of the Act, the Court held that it did apply to such cases; and Baron *Wilde*,

(*a*) 30 Law J., Exch. 40.

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one of the Judges of the Court, states very clearly the principles upon which that was held as follows:—"The principle that seems to me to be applicable to the case is this, that where you are dealing with a right of action, and an Act of Parliament passes, unless something express is contained in that Act, the right of action is not taken away; but where you are dealing with mere procedure, unless something is said to the contrary, and the language in its terms applies to all actions whether before or after the Act, there, I think, the principle is that the Act does apply without reference to the former law or procedure. Now that that is the principle appears from the cases that have been cited on both sides."

Now, to apply that principle to the present case: The 15th section of the Charter says in express terms, and in language which admits of no doubt whatever as regards the suits to which it applies, that an appeal shall lie to the High Court from the judgment (not being a sentence or order passed or made in any criminal trial) of one Judge of the High Court, or of one Judge of any Division Court; and that an appeal shall also lie to the High Court from the judgment of two or more Judges of the High Court, or of such Division Court, wherever such Judges are equally divided in opinion, and do not amount in number to a majority of the whole of the Judges of the Court at the time being, but that the right of appeal from other judgments of Judges of the High Court or of such Division Court shall be to the Privy Council.

There is nothing in this section to show that it was not intended to apply to all suits then pending in the High Court, and to all judgments which had been given by Judges sitting in the High Court; or that it was not intended to apply to suits in which decrees had been made but had not been executed. So far from there being anything in the Charter to show that it was not intended to apply to decrees which had been made before the Charter was published, and that there was to be any reservation in favour of those decrees, Sec. 2 would appear to show that there was no such intention.

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That section says "that all proceedings commenced in the said High Court prior to the date of the publication of the Letters Patent shall be continued and depend in the said High Court, as if they had commenced in the said High Court after the date of such publication." I do not say that these words may not bear a more limited meaning, although it does not appear to me that they do; but the intention would appear to have been not to make any reservation in favour of suits brought before the publication of these Letters Patent, or to provide that they should be continued in the same way as they would have been continued before that time, and that the parties should have preserved to them any right of appeal which then existed. The intention was that at the time the Letters Patent were published every suit pending in the Court should be treated as if it had been a suit brought after the Letters Patent were published. And certainly, applying the rule which I have stated, and which is laid down in the passage I have read from the judgment of Baron *Wilde*, and looking to these two sections of the Charter, I can see no ground for holding that this decree is not to be governed by the provisions of the present Charter, and that the party should be allowed such right of appeal as he had under the former Charter.

In the present case he is entitled, if he thinks fit, to appeal to the Privy Council; and I do not see that there is any great hardship in holding that in the case of a judgment by two Judges of this Court the party should be obliged to appeal to the Privy Council, without being at liberty, in the first place, to bring the matter before three Judges of this Court—for that would be the only effect of holding that he had got a right of appeal to this Court. I cannot say that in a case of this kind it appears to me that there is any great hardship or injustice suffered by the party; nor do I see that even in a case where there was no right of appeal to the Privy Council he would have any good right to complain because, his case having been heard and determined by two Judges of the

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Court, Her Majesty, in constituting the High Court under the present Charter, had decided that there should be no right of appeal.

It appears to me that what I have stated was the intention of the framers of the Charter, and that we must decide in the present case that the party has no right of appeal now to the High Court. The appeal must be dismissed with costs.

NEWTON and SARGENT, JJ., concurred.

Appeal dismissed.

Attorney for appellant : *C. Tyabji.*
Attorneys for respondents : *Cleveland and Peile.*

NOTE.—The corresponding sections of the two Charters are as follow :—

Sec. 14.—And We do further ordain that an appeal shall lie to the said High Court of Judicature at Bombay from the judgment, in all cases of original civil jurisdiction, of one or more Judges of the said High Court or of any Division Court, pursuant to Section 13 of the said recited Act; Provided always that no such appeal shall lie to the High Court as aforesaid from any such decision made by a majority of the full number of Judges of the said High Court, but that the right of appeal in such case shall be to Us, Our heirs or successors, in Our or their Privy Council, in manner hereinafter provided.—*Letters Patent of 26th June* 1862.

Sec. 15.—And We do further ordain that an appeal shall lie to the said High Court of Judicature at Bombay from the judgment (not being a sentence or order passed or made in any criminal trial) of one Judge of the said High Court, or of one Judge of any Division Court pursuant to Section 13 of the said recited Act; and that an appeal shall also lie to the said High Court from the judgment, not being a sentence or order as aforesaid, of two or more Judges of the said High Court, or of such Division Court, wherever such Judges are equally divided in opinion, and do not amount in number to a majority of the whole of the Judges of the said High Court at the time being; but that the right of appeal from other judgments of Judges of the said High Court or of such Division Court shall be to Us, Our heirs or successors, in Our or their Privy Council, as hereinafter provided.—*Letters Patent of 28th December* 1865.

Original Suit No. 715 *of* 1865; *Appeal No.* 29.

DA'DA'BHA'I NAOROJI' & Co....*Plaintiffs and Appellants.*
SORABJI' CA'WASJI' .....*Defendant and Respondent.*

Motion for commission and to adjourn suit—Application to withdraw.

The plaintiffs' attorney being under the misapprehension that one of the plaintiffs—who was a material witness—was in Bombay, when in fact he was in England, and an application to consent to a commission having been made to the defendant's attorney and refused on the eve of the hearing;—an application was made to the Judge in chambers, on the morning of the day fixed for the hearing, and supported by an affidavit, for the issuing of a commission and for an adjournment of the suit; and the Judge declining to make an order in chambers, the application was renewed in Court, when the Judge refused to take notice of what had occurred before himself in chambers, and made a note that the application for a commission was made upon no affidavit; and as the affidavit (presented in chambers) had been sent to the office of the plaintiffs' attorneys, for a copy to be made and served upon the defendant, and was not then in Court, the application for a commission and to adjourn the hearing was refused; and plaintiffs' counsel not being instructed to proceed with the hearing, and leave to withdraw the suit having been also refused, the suit was dismissed:—

Held that the Judge was wrong in refusing to postpone the case for the production of the affidavit in Court; and that there was no legal ground whatever for the refusal to withdraw the suit, which was accordingly restored to its place in the list, and remanded in order to be tried.

1866. January 22. O.S. No. 715 of 1865.

THIS was an appeal from a decree made, on the 8th of September 1865, by Mr. Justice ANSTEY, then an Acting Judge of the High Court.

The plaintiffs are Parsí merchants carrying on business in London and Liverpool; and they claimed in their plaint Rs. 1,20,578, being the aggregate amount due by the defendants on five bills of exchange, drawn by the plaintiffs and accepted by the defendants.

Mr. Lynch was the attorney for the plaintiffs, and it appeared that he was under the impression that one of the plaintiffs, Mánekjí Cursetjí Cámá, a material witness in the case, who was then in England, was in Bombay. Mr. Lynch left for England before the cause was heard, and it was not dis-

1866. January 22. O. S. No. 715 of 1865.

covered until after his departure that Cámá was not in Bombay. Dr. Dallas, the partner of Mr. Lynch, wrote to the defendant's attorney, asking him to consent to the issue of a commission to England to take the evidence of Cámá. A reply, refusing to consent, was received by Dr. Dallas on the 7th of September 1865.

The suit was fixed for hearing on the 8th of September; and on the morning of that day an application was made to Mr. Anstey, in chambers, for the issue of a commission to England to examine Cámá. The application was based upon an affidavit made by Jamsetjí Pálanjí, one of the plaintiffs, in which it was stated that the plaintiffs could not safely proceed to a hearing of the suit without the testimony of Cámá; and an adjournment of the suit was asked for. Mr. Anstey declined to make any order in chambers; and the cause appeared in that day's list. The application was renewed in Court. The minutes of the Judge as to what occurred on the occasion, were as follows:—

"Mr. Taylor, for the plaintiffs, before this cause is called on, moves for a commission to go to London to take the evidence of Mánekjí Cursetjí Cámá, one of the plaintiffs, *but upon no affidavit*. Mr. Hayllar (for Mr. Howard) opposes. I refuse the application. The cause is then called. Mr. Taylor applies for leave to withdraw the suit and file a fresh one. I refuse the application. Mr. Taylor *submits to have the suit dismissed*. Decree to dismiss accordingly with costs."

Appeal No. 20.

The appeal came on for hearing this day before COUCH, C. J., and WESTROPP, J.

The Acting Advocate General (*Honorable J. S. White*) and *Taylor* for the appellants.

Mayhew and *Marriott* for the respondent.

Taylor:—It was not strictly correct to say that I made the application "upon no affidavit." I reminded the learned Judge that the affidavit of Mr. Jamsetjí Pálanjí had been shown to him in chambers; and mentioned that it was sent to the attorney's office for a copy to be made, for the pur-

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pose of being served on the defendant, and that it had been sent for by Dr. Dallas, and was being brought to the Court. In fact, the affidavit was brought into the Court immediately after. The Judge declined to hear the application, because the affidavit was not then before him; and said that he could not take notice of what had occurred in chambers. The first nine cases on the list were then gone through very rapidly; and the plaintiff's case, which was not expected to come on for hearing so soon, and which stood the tenth on the list, was called on for hearing. I was told to go on with the suit, when I stated that I was not instructed for the hearing, and applied for leave to withdraw the suit. In answer to the learned Judge, I admitted that I appeared alone on the motion: whereupon the Judge said that, having regard to the rule of the Bar, he refused the application.

White, on the same side.—The Judge refused to dispose of the application for a commission in chambers, and adjourned it into Court. It being necessary to serve a copy of the affidavit on the other party, no time was lost by the plaintiffs' attorneys; and although the Judge was informed of this fact when the motion was made in Court, and was perfectly aware that the affidavit had been already made, and, further, that every effort was being used to get it before the Court, he refused the application for a commission. It was true that, when the matter came before the Court, the affidavit was not literally before the eyes of the Judge. A Judge could hardly be said to have exercised a wise discretion, if he did not allow a momentary delay for the interests of justice. The counsel was at the mercy of the Judge, and, in his difficulty, he applied to be allowed to withdraw the suit. This application was refused on the ground that Mr. Taylor appeared alone, and that a rule of the Bar had not, therefore, been complied with. [COUCH, C. J.—I do not think the Judges have anything to do with a rule of the Bar, or with Bar etiquette.] There is nothing to show that the objection to Mr. Taylor appearing alone, was raised by counsel on the other side.

1866. January 22. Appeal No. 29.

The decree was not *submitted to* by the plaintiffs' counsel, although it is so stated in the Judge's notes. It could not have been under Sec. 110 of the Code that the decree was made, because both the parties were present. The decree says:—"This suit being this day called on for hearing and final disposal, Mr. Taylor being counsel for the said plaintiffs, and Mr. Hayllar (for Mr. Howard) counsel for the defendants, Mr. Taylor applies for leave to withdraw the suit and bring a fresh one, which application being refused, this Court doth order and decree that this suit do stand dismissed." The suit should not have been peremptorily dealt with; as there was not the slightest pretence that the application for a commission was not a *bonâ fide* one. I, therefore, ask the Court to set aside the decree.

Mayhew, for the respondent, was instructed to admit the accuracy of the statements made by the counsel for the appellants; but contended that the respondent should not be saddled with the costs of the appeal.

COUCH, C. J.—In this case it would appear, from the facts stated by Mr. Taylor, and acquiesced in by Mr. Mayhew, that an application was made to the learned Judge in chambers for the issuing of a commission to England, to take the evidence of a material witness in the case, on which occasion an affidavit of one of the plaintiffs was produced; but that the affidavit not being in Court when the motion was made by Mr. Taylor, the learned Judge refused the application on that ground. If an application had been made to me under such circumstances, I should have postponed the case for a short time to allow the party to produce the affidavit, and I should not have considered myself justified in refusing the application on such a ground. I think the learned Judge did not exercise a wise discretion in refusing the application because the affidavit was not actually before him.

That having been done, Mr. Taylor applied for leave to withdraw the suit under the circumstances. Supposing even that the plaintiffs had come into Court unprepared, and

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without an affidavit, I should have thought that I ought in justice to grant the application to withdraw the suit, subject to the penalty of costs, and not to debar them for ever from recovering any portion of their claim, which is a very large one. Viewing their conduct in the most unfavourable light, I think they ought to have been allowed to withdraw the suit.

The learned Judge refused it for a reason which to my mind is quite insufficient,—that Mr. Taylor was the sole counsel. There is no rule of law that a suitor may not be represented by one counsel. It is a matter between counsel themselves, and it must rest between them and the public. It does not appear that there was any legal ground whatever for the learned Judge's refusal to allow the suit to be withdrawn with leave to file a fresh one.

After the explanation given, and regarding the way in which the decree was drawn up, the Court sees no ground to suppose that it was given with the consent of plaintiffs' counsel. The learned counsel was in a helpless condition at the time—whether he submitted or not, makes no difference. The error arose from a previous proceeding. The learned Judge was wrong in refusing to postpone the cause until the affidavit could be produced; and he was also wrong in refusing leave to withdraw the suit.

We, therefore, reverse the decree and remand the suit: each party to pay its own costs of the appeal; the plaintiffs to pay the costs of the motion on the 8th of September.

WESTROPP, J.—I quite concur.

Appeal allowed.

Original Suit No. 597 *of* 1865; *Appeal No.* 36.

HARDATRA'I SHRIKISONDA'S.. *Plaintiff and Appellant.*
VICTORIA FINANCE AND
BULLION ASSOCIATION.. *Defendants and Respondents.*

Judgment by default—Appeal from rejection of application to set aside.

On appeal from the rejection of an application made, under Sec. 119 of Act VIII. of 1859, to set aside a judgment by default:—

Held **that, in order to satisfy the Court "that the plaintiff was prevented by any sufficient cause from appearing," it was enough to show that there had been a *bonâ fide* mistake, which was not unreasonable.**

1866. January 22. O. S. No. 597 of 1865.

THIS was an appeal from the rejection by Mr. Justice ANSTEY, on the 12th of September 1865, of an application made on behalf of the plaintiff, under Sec. 119 of the Civ. Proc. Code, for an order to set aside a judgment passed against the plaintiff by default on the 8th of September preceding.

The cause originally came on for hearing on the 11th of August and was then postponed, by order of the Court, to enable the defendants to file a written statement, which they were directed to do and to furnish a copy to the plaintiff's attorney within three weeks. The case was to appear again in the daily list of causes on the expiration of one month. No such statement was filed, nor was a copy of it furnished to the plaintiff's attorney according to the order of the Court, and the attorney was under the impression that, a calendar month being meant by the order, the cause could not come on for hearing again until the 11th of September. It happened, however, that it was erroneously put down in the list of causes for trial on the 8th of September, and was called on in its turn on that day. No one appeared for the plaintiff; and, on the motion of the defendants' counsel, the Judge gave a decree against the plaintiff by default.

On this fact coming to the knowledge of the plaintiff's attorney he instructed counsel the same day. The Judge was applied to under Sec. 119 of the Civ. Proc. Code, and

1866. January 22. O. S. No. 507 of 1865.

on an affidavit by the plaintiff's attorney, Mr. Crawford, for an order to restore the cause to the list, and to set aside the decree which had been passed against the plaintiff. The Judge found fault with the affidavit as being vague, equivocal, and unsatisfactory, and refused to make an order on the motion, until another affidavit should be submitted to him. On the 9th of September counsel again moved the Court on behalf of the plaintiff, on a second affidavit made by Mr. Crawford. That affidavit stated that the previous one of the 8th was made and placed in the hands of counsel about 1 P.M. that day, and within half an hour of the time Mr. Crawford ascertained that the cause had been erroneously set down on the board. The clerk who attended to the suit, under Mr. Crawford's directions, had been ill for several days, or in all probability the circumstance of the cause being on the board would have come to Mr. Crawford's notice as soon as the Court sat, and he would have instructed counsel earlier than he did. He (Mr. Crawford) did not personally attend in Court, because he knew there should have been no suit on the day's list which required his attendance. The Judge declared this second affidavit to be also equivocal. Mr. Crawford expressed his willingness to be examined upon oath in Court; but the Judge remarked that the affidavit being untrustworthy and equivocal, another one must be filed before he could grant the motion. On the 11th of September the matter was again brought under the notice of the Court by counsel for the plaintiff, when a third affidavit by Mr. Crawford was submitted. The learned Judge considered it to be eminently unsatisfactory; and ordered the matter to stand over to give the defendants' counsel an opportunity of being heard. On the 12th of September the matter was again mentioned to the Court by *Bayley*, as counsel for the plaintiff, who begged to be informed whether the Court granted or refused the motion. The Judge inquired whether another affidavit had been made by Mr. Crawford, and the answer being in the negative, he said he would make no order on the motion; and this was understood to be tantamount to a refusal of the motion.

1866. January 22. Appeal No. 36.

The grounds of appeal were as follow:—1, that the Judge ought to have held, upon the affidavits and the certificate of the Deputy Registrar filed in support of the application, that it was proved to the satisfaction of the Court that the plaintiff had been prevented by sufficient cause from appearing when the suit was called on for hearing; 2, that the Judge ought to have passed an order to set aside the judgment by default, and appointed a day for proceeding with the suit; 3, that the rejection of the application to have the cause restored was contrary to justice and right.

The appeal came on for hearing this day before COUCH, C. J., and WESTROPP, J.

Bayley and *Marriott* for the appellant.

The Honorable J. S. White and *Green*, for the respondents, admitted that there had been a *bonâ fide* mistake on the part of the plaintiff's attorney, and that in consequence thereof he did not instruct counsel on the 8th of September.

COUCH, C. J., said that the Court concurred in thinking that the affidavits filed by the plaintiff's attorney were not unsatisfactory. Considering the various instances in which a month is considered to be a calendar month, and that such a practice had been in force in the Master's office, the Court thought the excuse given in the affidavit was a good one. It was enough to say that there had been a *bonâ fide* mistake—which was not unreasonable—and that was sufficient to entitle the plaintiff to have the case restored to the list. Ultimately, the matter resolved itself into a question of costs. The defendants' conduct on the 8th of September disentitled them to costs.

The Court reversed the order of the Judge made on the 12th of September, rejecting the application; and also set aside the decree of the Judge of the 8th of September. Each party to pay its own costs of the appeal; the defendants to have the costs of the hearing of the 8th of September, if ultimately successful. The case was ordered to be set

down on the board on Thursday, the 15th of February : the defendants to file and give a copy of a written statement to the plaintiff on or before the 8th of February. 1866. January 22. Appeal No. 36.

Appeal allowed.

NOTE.—In Appeal No. 39, *Vandrávandás Jamnádás* v. *Victoria Finance and Bullion Association*, a decree by default having been given against the plaintiff on the same day and under circumstances exactly similar to those of the above case, and the grounds of appeal being also the same, the respondents' counsel consented to a similar order being made.—ED.

Original Suit No. 581 *of* 1864; *Appeal No.* 32.

BHIMJI' GIRDHAR..... *Defendant and Appellant.*

W. J. MORGAN ..... *Plaintiff and Respondent.*

Appeal—Judge's notes—Security for costs.

A certified copy of the Judge's notes not having been filed; and there being no certificate from the Prothonotary that security had been given for costs;—the appeal was dismissed for non-compliance with the Rules of the Court.

THIS was an appeal from the decision of Mr. Justice COUCH, who gave judgment for the plaintiff, on the 7th of September 1865, for Rs.17,625 for damages and costs, by reason of the defendant's breach of a contract for the delivery of cotton. January 27.

This was the day fixed for hearing the appeal.

Marriott now applied for leave to file a certified copy of the Judge's notes, which, owing to a misapprehension, had not been filed in accordance with the Rule of the Court in that respect. There was an affidavit by a clerk of the appellant's attorney, who deposed that he was under the impression, until within the last day or two, that the notes had been filed. It would be sufficient punishment to the appellant to have to pay the costs of an adjournment of the hearing of the appeal, which was now asked for.

1866. January 27. Appeal No. 32.

Howard for the respondent stated that there was another defect in the conduct of the appeal. There was no certificate from the Prothonotary that security had been given for costs.

ARNOULD, J.—There has been negligence in the conduct of this case. The Rules of the Court have not been complied with; and the appeal must, therefore, be dismissed.

WESTROPP, J.—I am of the same opinion. The Court must assert its Rules. No sufficient excuse has been put forward for the failure of the appellant to comply with them.

Appeal dismissed with costs.

Original Suit No. 388 *of* 1865 ; *Appeal No.* 40.

MUHAMMADBHA'I DHARAMSI' and another ..... *Plaintiffs and Appellants.*

BHA'NJI' TOPAN ..... *Defendant and Respondent.*

Security for costs—Time within which to appeal.

Appeal dismissed, as the appellants had not given security for costs; and as the appeal had not been filed within the time required by the Rules of the Court.

It is sufficient for the respondent to object at the hearing of the appeal for non-compliance with the Rules of the Court; and he need not apply specially to have the appeal rejected, when the memorandum of appeal is preferred.

February 1.

THIS was an appeal from the decision of Mr. Justice ANSTEY, who dismissed with costs a suit brought by the appellants for the recovery of Rs. 4,648-4-8, as damages for breach of a contract by which the defendant had agreed to purchase from the plaintiffs 1,000 bales of Ambara jute.

Marriott (with him *McCulloch*), for the respondent, objected to the appeal being heard, as the appellants had not given security for costs, as required by the Rule of the Court, and by Sec. 342 of the Civ. Proc. Code. Another rule (published on the 16th of June 1865) had also been disregarded.

1866. February 1. Appeal No. 40.

which required the memorandum of appeal to be filed "within ten days after the judgment, order, or decree shall have been pronounced, exclusive of the time requisite for obtaining copy of such judgment, decree, or order."

Bayley (with him *Reid*), for the appellants, contended that the rule referred to a certified copy of the decree, which could not be obtained from the Prothonotary's office until after the decree was sealed. The decree was sealed on the 30th of November 1865, but the appellants did not obtain a certified copy until the 12th of December, from which date they were entitled to ten days within which to file the memorandum of appeal. The respondent was, moreover, too late with this objection, which he should have brought forward when the memorandum of appeal was preferred.

Marriott, in reply, referred to the correspondence between the attorneys, to show that the respondent had given notice of his intention to rely upon the objection now raised.

COUCH, C.J., said that the appeal should be dismissed, as the Rules of the Court had not been complied with. It was not necessary for the respondent to have made any special application to the Court in regard to these objections; and it would not be right to establish a practice of that kind, which would increase the expense to suitors.

WESTROPP, J., concurred.

Appeal dismissed with costs.

NOTE.—The Rules now in force, as published on the 20th of November 1866, are as follow:—

1. An appeal from, or application to review, any decree, order, or judgment of any Division Court or Judge of the High Court in the exercise of its original [civil] jurisdiction shall be preferred within *twenty* days after the judgment shall have been pronounced or the order made; unless such Division Court or Judge shall, within such period, enlarge the time for making such appeal or application for a review.

2. It shall *not* be necessary for the Memorandum of Appeal to be accompanied by a copy of the decree or order appealed against, but the Memorandum of Appeal shall state the substance of the judgment appealed against, and be in the following form, or to the following effect:—(*Form.*)

3. If the substance of the judgment shall not be correctly stated, the Court of Appeal may set aside the Memorandum of Appeal, or may order it to be amended.

1866. Nov. 20.

4. Memoranda of Appeal, accompanied by the Prothonotary's certificate that security has been given, are, provided they are within the prescribed time, twenty days, to be filed in the Prothonotary's office, and *not* presented in Court.

5. In all cases in which a Memorandum of Appeal is filed, the Attorney of the party appealing shall apply forthwith to the Clerk of the Judge by whom the case was tried for a copy of the Judge's Notes of the trial, which copy must be certified by such Judge's Clerk, and must be filed with the Prothonotary at least two days before the day fixed for the hearing of the appeal; a copy of the Judge's Notes must also be forwarded by the Attorney for the Appellant, at the same time, to the Clerk of each of the Judges sitting in Appeal.

6. No Memorandum of Appeal will be received, except by special order of Court, unless attended by a certificate from the Prothonotary that security has been given for costs.—ED.

Original Suit No. 365 *of* 1865; *Appeal No.* 38.

W. B. THOMPSON.....*Plaintiff and Appellant.*
JEHA'NGI'R HORMASJI' ... *Defendant and Respondent.*

Production of document when plaint is presented—Filing of copy—Restoration of suit— Civ. Proc. Code, Secs. 39 *and* 351.

In a suit brought upon a promissory note, where the note was produced when the plaint was presented, and marked by the officer of the Court; but the Judge, at the hearing, refused to receive it, when tendered in evidence, because he found that there was no *copy* of the note among the papers, and the plaintiff's counsel was unable to explain the omission; and, there being no application made to withdraw, the suit was dismissed:—

Held that the Judge ought to have received the note in evidence, as it was "produced in Court by the plaintiff, when the plaint was presented;" that the plaintiff's counsel was not bound, under the circumstances, to apply to withdraw the suit; and that the Judge was not justified in dismissing the suit—which was, accordingly, remanded, under Sec. 351 of the Code, with a direction that it should be restored to its original place on the Register, and be tried by one of the Judges of the Court.

1866. June 21. Appeal No. 38.

APPEAL from the decision of Mr. Justice ANSTEY.

The Original Suit was brought on a promissory note for Rs. 5,000 and interest, made by the defendant and payable to the plaintiff or order on demand. The plaintiff was the Agent in Bombay of the Delhi Bank Corporation.

The suit was called on for hearing on the 4th of November 1865, when it was dismissed with costs, on the ground that no copy of the note had been filed with the plaint.

Pigot (with him *Cooper*), for the appellant (after reading the Judge's notes, and referring to Sec. 39 of the Code of

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Civil Procedure):—The decision was given in spite of the production of the original note in court at the hearing. The terms of the Act had been complied with, as the original document was produced in court. The intention of the Legislature in providing for the filing of a copy seemed to be to give the Judge an opportunity of looking over the case before the hearing, as he was supposed to do, and nothing more.

Cooper said that he was in court at the time of the trial; that the attention of the learned Judge was called to the original document, and though the plaintiff's counsel offered to amend the plaint, the Judge refused to allow it to be done.

The respondent did not appear.

COUCH, C.J.—In this case, which was a suit brought upon a promissory note, it is stated in the notes of the learned Judge (after mention of an application on the part of the counsel for the plaintiff to amend the plaint)—"I examine the record, and find that no copy has been filed of the note on which the action is to be brought. Mr. O'Leary cannot explain the omission. I refuse leave to amend under these circumstances, and inform him that I shall decline to receive the note in evidence. Mr. O'Leary hereupon tenders the note, and says he has no other application to make."

The note which was so tendered by the learned counsel appears to bear upon it the mark of the officer of the court—the Deputy Registrar—who was present with the Judge at the time when he was receiving the plaint, the mark showing that the note had been produced to the learned Judge at the time when the plaint was presented. Whether the copy had been left with the officer of the Court at the time when the mark on the note was made, and had in some way been detached from the papers, or whether it was an oversight of the officer of the Court at the time in not getting the copy before he returned the note, does not appear; but the fact is beyond question that the note bore a mark of having been produced at the time the plaint was presented, and that the note was tendered to the learned Judge, who, however, refused to receive it.

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Now, Sec. 39 of the Code of Civil Procedure, under which, if at all, this proceeding on the part of the learned Judge can be justified, enacts that "when the plaintiff sues upon any written document, or relies upon any such document, as evidence in support of his claim, he shall produce the same in court (which corresponds in this court to the Judge sitting in chambers) when the plaint is presented, and shall, at the same time, deliver a copy of the document to be filed with the plaint;" and "The Court (or, in this court, the Judge by his officer) shall forthwith mark the document for the purpose of identification, and, after examining and comparing the copy with the original, shall return the document to the plaintiff." And then the latter part of the section says: "Any document not produced in court by the plaintiff, when the plaint is presented, shall not be received in evidence on his behalf at the hearing of the suit, without the sanction of the Court." It does not say that any document, of which a copy does not appear on the record of the court, shall not be received in evidence without the sanction of the Court:-it speaks only of a document which is not produced at the time when the plaint is filed. And it does not appear to me that there is *any* provision in the Code which would justify the Judge in refusing to receive the note in evidence, because he "examined the record and found that no copy of the note was filed with the papers," and because the plaintiff's counsel was unable to explain the omission. The document appears to have been produced when the plaint was filed; and, therefore, it did not come within the terms of the Code, which apply to a document that was not produced when the plaint was presented.

The Judge was not justified in declining to receive it in evidence upon the ground which he assigned for so doing. And that appears to be the only ground on which he ultimately came to the conclusion in favour of the defendants, because he says—"I refuse to receive the note," and then, "there being no further evidence offered, and no application to withdraw the suit, I dismiss the suit." The plaintiff was not bound to apply to withdraw the suit. He was entitled

to put the note in evidence; and the Judge ought to have received it. The decree of the court below must, therefore, be reversed; and we must remand the case, under Sec. 351, with a direction that the suit be restored to its original number in the Register, and be tried by one of the Judges of this court.

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WESTROPP, J.—I completely concur in the remarks of the Chief Justice.

Pigot applied for the costs of the appeal.

WESTROPP, J.—You cannot show any dissent on the part of the respondent to a reversal of the decree.

Pigot.—Will the costs, then, be costs in the suit? It seems hard that they should be borne by the appellant.

COUCH, C. J.—It would be equally hard in the case of the defendant. The defendant has stayed away, and seems to have been quite content that judgment should be given against him. I do not see that he can be made to pay costs. There ought to be no costs. Very possibly if the defendant had been here, he would not have taken any objection to the reversal of the decree.

Decree reversed and suit remanded.

Attorneys for appellant: *Keir, Ramsden, and Prescot.*

Original Suit No. 545 *of* 1865; *Appeal No.* 35.

PARBHUDA'S PRANJI'VANDA'S... *Appellant and Defendant.*
RA'MLA'L BHA'GIRATH ... *Plaintiff and Respondent.*

Sale of shares for future delivery—Readiness and willingness—Specific performance—Share "receipts."

Held **that a contract to deliver shares in a public company is sufficiently performed when the vendor places the vendee in such a position as enables him to become the legal owner of them.**

A share in a company signifies a definite portion of its capital; and does not necessarily mean the right of a person whose name is then actually on a register of shareholders.

APPEAL from the decision of Sir M. R. SAUSSE, C.J.

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The Original Suit was brought upon an agreement by which the defendant (the appellant) agreed to purchase from

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the plaintiff (the respondent) 200 shares in the Union Financial Corporation for the sum of Rs. 24,000—Rs. 50 being paid as earnest money; the purchase to be completed on the 1st of July 1865, or at any such time before that day as the purchaser might think fit to pay the purchase money.

The suit was heard on the 24th and 26th of November 1865; and the decree declared the plaintiff entitled to specific performance of the agreement, and on his undertaking to hand over the shares forthwith to the defendant, and to execute all proper transfers, &c., that he should recover from the defendant the sum of Rs. 24,420-5-0 for purchase money and interest, and Rs. 979 for costs.

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The grounds of objection taken to the decree on appeal were as follows:—That the Judge was in error in holding: (1) that the plaintiff was ready and willing to deliver the 200 shares of the Union Financial Corporation to the defendant; (2) that the plaintiff was possessed of the 200 shares on the 1st of July 1865; (3) that the receipts given by the corporation to the plaintiff were equivalent to share certificates; (4) that the plaintiff ought not to have tendered share certificates of the said shares on the 1st of July 1865; (5) that the plaintiff had not been guilty of such unreasonable delay in perfecting his title to the said shares as to disentitle him to a specific performance of the said contract; (6) that, on the 1st of July 1865, the plaintiff had a clear and unambiguous title to the said shares, so as to entitle him to a specific performance of the contract; (7) that it was not necessary to tender, on the 1st of July, transfer deeds of the said shares, duly stamped and executed; (8) that the blank transfer papers tendered by the plaintiff were sufficient.

The appeal now came on for hearing before COUCH, C.J., and WESTROPP, J.

Bayley (*Taylor* and *Mayhew* with him), for the appellant, contended that the plaintiff, having failed to do what was required by the contract, was not entitled either to

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damages, or to a specific performance as decreed by the Chief Justice. The contract itself was not an inartificial document: it bore traces of a lawyer's hand, and was in the form (*a*) which had been adopted in nearly all *váidá* transactions in shares; and the Court would, he apprehended, hold either party to the strict interpretation of any part of the agreement. The third clause states what the plaintiff contracted to do. Now it was not a compliance with that clause simply to deposit the documents with the corporation, instead of executing a proper transfer. What the defendant contracted for were shares, and the plaintiff was bound to effect a legal transfer. The plaintiff, in handing receipts in the names of other persons, did not give the same right as if he had been himself a registered shareholder. The letters of allotment which he tendered, may have been stolen from the original allottee and have passed into the market. The allottee is entitled to the shares. The mere possession of receipts would not necessarily result in an absolute right to the shares; and the letters of allotment are waste paper, unless the holder is on the register of shareholders. The contract showed that the purchaser was at liberty to call upon the vendor to give him the shares on any day between the execution of the contract and the 1st of July; he had only to tender the money to demand the delivery of the shares. It was not enough to show readiness and willingness, but the party must show that he was in a position to effect a transfer on any day between the date of the execution of the contract and that of the delivery of the shares. It has been held that a party must show he has made a legal tender of stock, and that his readiness and willingness to transfer is not sufficient. The vendor is, moreover, bound to obtain the assent of the directors to the transfer of stock. Blank transfers, such as were tendered in this case, are utterly valueless. They were not filled up in the name of any person, and purported to be signed by the original allottee at the bottom. The instrument had a blank

(*a*) The form will be found in 2 Bom. H. C. Rep. 273.

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to be filled up afterwards, and, therefore, was waste paper. But the transfers tendered to the defendant, besides being blank, were not stamped. By this lax way of transfer the revenue is defrauded. The contract was not satisfied by the acts of the plaintiff.

The following authorities were cited:—*Paradine* v. *Jane* (*b*); *Calonel* v. *Briggs* (*c*); *Thorpe* v. *Thorpe* (*d*); *Wivell* v. *Stapleton* (*e*); *Warren* v. *Consett* (*f*); *Shelburne* v. *Stapleton* (*g*); Notes to *Walton* v. *Waterhouse* (*h*); *Glazebrook* v. *Woodrow* (*i*); *Bordenave* v. *Gregory* (*j*); *Hibblewhite* v. *McMorine* (*k*); *Humble* v. *Langston* (*l*); *Davis* v. *Bank of England* (*m*); *Diwergier* v. *Fellows* (*n*); *Jackson* v. *Allaway* (*o*); *Bensley* v. *Bignold* (*p*); *Josephs* v. *Pebrer* (*q*); *Wilkinson* v. *Lloyd* (*r*); *Boyd* v. *Lett* (*s*); *Enthoven* v. *Hoyle* (*t*); *Hunt* v. *Gunn* (*u*); *Bermingham* v. *Sheridan* (*v*); *Seton* v. *Slade* (*w*); *Commercial Bank* v. *Mudsudun Chowdry* (*x*); *Maganbhái Hemchand* v. *Manchhábhái Kalliánchand, per Anstey, J.* (*y*); Smith's Mer. Law, ed. 1865, pp. 58 & 64; Act XIX. of 1857, Secs. 18 and 19; Act X. of 1862, Secs. 2 and 3, and Sched. A, cl. 26.

White (with him *McCulloch*) for the respondent.—On the day for the delivery of the shares the plaintiff proceeded in person to the defendant, whom he saw, and to whom he offered the receipts in person. The purchaser having taken no steps in the interval, the plaintiff offered to him, on the due date, receipts for 205 shares, accompanied by blank transfers, and application forms for transfer, all signed by him; and was ready there and then to put the necessary stamps upon the papers, and there and then to execute the transfers. The defendant, observing the receipts, objected

(*b*) Dyer 33 a.; S. C. Aleyn 27. (*c*) 1 Salk. 112. (*d*) *Ibid.* 171. (*e*) 8 Mod. 68.
(*f*) *Ibid.* 107. (*g*) *Ibid.* 292. (*h*) 2 Saun. 422 a. (*i*) 8 T. R. 366.
(*j*) 5 East 107. (*k*) 6 M. & W. 200. (*l*) 7 M. & W. 517.
(*m*) 2 Bing. 393. (*n*) 5 Bing. 248. (*o*) 6 M. & Gr. 942.
(*p*) 5 B. & Ald. 335. (*q*) 3 B. & C. 639. (*r*) 7 Q. B. 27.
(*s*) 1 C. B. 222. (*t*) 13 C. B. 373. (*u*) 3. Fos. & Finl. 223.
(*v*) 33 Law J., N. S. Chan. 571. (*w*) 2 Tudor L. Ca. Eq. 377.
(*x*) Ind. Jur. N. S. 17. (*y*) *Vide* next Case.

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to them because they were for 205 shares, whereas he had contracted for 200 only. It was explained to him that there was formerly a receipt for 25 shares in the name of Mr. T. Garrett, Postmaster, but that gentleman being absent from Bombay, the plaintiff had purchased in the market a receipt for thirty shares, five of which would be transferred into his (plaintiff's) name, and the rest into that of the defendant's. The plaintiff had completed his part of the contract. The defendant hung back during the whole interval, and appeared to be reluctant to take delivery; and the plaintiff, knowing that, did not go through the empty form of filling up the blanks and putting stamps to the transfers. They would both have been wasted; but the plaintiff went so far through the preliminary ceremony as to keep them ready with him. He was entitled to recover on the third clause, even though he had not signed the transfers or filled them up. A great portion of the argument proceeded on the basis of not distinguishing between the word "shares" and the title to a certain interest in a company. There could be no doubt that, on the 1st of July 1865, the plaintiff had an equitable title to the 200 shares, and he was afterwards clothed with the legal title. In no part of the agreement was there any condition that the vendor should be a registered holder of the shares. The plaintiff had got all the materials on the spot to effect the transfer, had the defendant shown any inclination to receive and pay for the shares; and in tendering the blank transfers and stamps with receipts the plaintiff did all he was required by the contract to do. It was the intention of the parties that no name should be introduced into the transfer; it could have been done at the moment, because the plaintiff went in person to tender the shares. Reference had been made to the ruling of another court that the vendor should be a registered shareholder between the date of the contract and the date of delivery of the shares. The authorities were the other way. The learned Chief Justice [Sir M. R. Sausse] was of a different opinion in the *Imperial Banking Company* v. *Átmárám Mádharji* (*z*). It was

(*z*) 2 Bom. H. C. Rep. 260.

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wholly immaterial what documents the vendor had, if they were sufficient, as declared by Mr. Clifton, to effect a transfer of the shares into the name of the purchaser. The plaintiff went one step further than was necessary. He handed the receipts for the shares to the manager of the Union Financial for a transfer into the purchaser's name, which he was not bound to do. The plaintiffs in the case of the *Imperial Banking Company* v. *A'tmárám Mádhavji* did not at all apply for a transfer into the purchaser's name, and yet they recovered. It would have been a work of supererogation on the part of the plaintiff to have had the shares transferred into the defendant's name, because the latter was reluctant to take delivery, and was not ready with the money. He did all, and more than, he was bound to do. There had been a conflicting decision cited, but the Court would have no difficulty in coming to the right conclusion.

Bayley was heard in reply.

Cur. adv. vult.

July 20.

COUCH, C. J.—This was a suit upon an agreement by which the defendant (the appellant) agreed to purchase from the plaintiff (the respondent) two hundred shares in the Union Financial Corporation for the sum of Rs. 23,590; the purchase to be completed on the 1st of July 1865, or at such time before that day as the purchaser might think fit to pay the purchase money.

The plaint was filed on the 8th of July, and the plaintiff prayed that the defendant might be decreed specifically to perform the agreement, or to pay damages. The defendant put in a written statement, and the suit came on for hearing before the late Chief Justice on the 24th of November last, when the following issues were framed :—(1) whether the plaintiff was ready and willing to deliver the 200 shares to the defendant according to his contract; (2) whether the contract was a wagering contract under Act XXI. of 1848.

The defendant's counsel, at the close of the examination of the defendant, abandoned the second issue, and the learned

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Judge found the first issue for the plaintiff, and declared him entitled to specific performance of the agreement; and, the plaintiff undertaking to hand over forthwith the said shares in the agreement mentioned to the defendant, and to execute all proper transfers, and to do all other matters, and pay all expenses for that purpose required by the third paragraph of the agreement, he decreed that the plaintiff should recover from the defendant Rs. 24,420-5-0 for purchase money and interest.

Against this decree the defendant appealed, on the ground that the learned Judge was in error in finding the first issue for the plaintiff, and holding that the plaintiff was entitled to a specific performance of the agreement. The case came on for hearing before the Court of Appeal on the 26th of January last, and was fully argued by counsel on that day, and on the 30th of January, when the appellant's counsel was heard in reply; and it being stated by him that a similar question was raised in another appeal from a decree of Mr. Justice *Anstey*, which was about to be presented, we thought it right to postpone giving judgment until that appeal had been heard.

That Appeal was heard before us on the 21st of June last, and the finding of the court below on the issue—whether the plaintiff was ready and willing to perform his contract—was reversed, and the case remanded for trial of the issue—whether the contract was a wagering one—the Judge having omitted to determine that, and the defendant not having given evidence upon it, in consequence of the first issue being found for him upon the evidence given by the plaintiff.

The facts of that case were different from those of the present case; but the cases resemble each other in this, that the question in both of them was, what was the vendor bound to do in order to perform his part of the contract?

In order to determine this in the present case, it is necessary to consider what it was that the plaintiff agreed

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to sell and the defendant to buy. In the contract they are called "Two hundred shares, of (Rs. 100 being already paid) Rs. 400 each in the Union Financial Corporation, to be transferred, as hereinafter mentioned." A share in a company signifies a definite portion of its capital, and a contract to sell a share is a contract to sell and transfer that right. By using the word "share," the parties to a contract of sale do not necessarily mean the right of a person whose name is then actually on a register of shareholders. This appears from the cases of *Mitchell* v. *Newhall* (*a*), *Tempest* v. *Kilner* (*b*), and *Beckitt* v. *Bilbrough* (*c*). And a contract to deliver shares in a public company is sufficiently performed when the contracting party places the other in the position of being the legal owner of them: *Hunt* v. *Gunn* (*d*). We think the contract in the present case was a contract to sell to the defendant the right to 200 portions of 400 rupees each in the capital of the Union Financial Corporation, and to transfer that right to the defendant, and pay the expenses of such transfer and of getting the defendant's name entered in the books of the company as the owner thereof; and the question is, whether the plaintiff has shown that he was ready and willing to do this.

The first witness was the plaintiff himself, who said that on the 1st of July he went with a clerk of his attorney to the defendant, and took with him the receipts for 200 shares and a notice; that they saw the defendant, and the attorney's clerk handed to him the receipts and the applications for transfer, twenty-three in number, with stamps to the amount of Rs. 50. The applications for transfer were signed by the plaintiff, and he got the receipts he tendered to the defendant from the company's office, when he gave the allotment papers for 200 shares to the company. That he applied for certificates of shares when he got the receipts, and they said the certificates were not ready, and he was put off from day to day, but on the 13th of July the certificates produced were given to him by the bank in lieu of the receipts. (The

(*a*) 15 M. & W. 308; 15 Law J., Ex. 292. (*b*) *Ibid.* C. P. 10; 3 C. B., 253.
(*c*) 8 Hare 188; 19. Law J. Ch. 522. (*d*) 13 C. B., N. S. 123.

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certificates produced amounted in all to 200 shares.) That after the defendant had taken and examined the documents, he asked for the money. The defendant said there were 205 shares (the cause of this had been explained by the witness), and he then asked the defendant to come to the bank and have 200 shares transferred to his name, and five should be transferred to his own; that the defendant said "Go now," and took notes of the receipt papers, and gave them back to him.

The next witness was Mr. Charles Clifton, the then manager to the liquidators of the Union Financial Corporation, and formerly its secretary; and he said, that a receipt which he had lost after he came into court, being one of eight, was given to the plaintiff, and the possession of it by him would entitle him to have share certificates issued in the name of the original allottee, and transferred to the person whose name would appear on the transfer papers as the transferee. The eight receipts were given to the plaintiff in exchange for allotment papers and transfer papers and applications for transfer and deposit receipts. If the defendant or any one had produced those eight receipts with transfers signed by the plaintiff, and letters of application, all signed by the plaintiff, he would, in the ordinary course of business, have transferred the shares to the defendant, after receiving the order of the directors, and he did give the plaintiff certificates upon the 9th of July upon the receipts they had. On cross-examination he said that if the plaintiff had applied earlier, the share certificates could have been issued before the 1st of July.

As to what passed at the interview with the defendant, the plaintiff's evidence was confirmed by the attorney's clerk.

The next witness was Mr. John Smith, the officiating manager of the Financial Association of India and China, who said that such receipts as had been produced were, as he believed, received as shares in the market until certificates were ready. That he had had many transactions with

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joint stock companies and banks, and had invariably found that such receipts were treated as giving a right to the certificates; and that, had he granted a *certificate* similar to at in the present case, he would have felt bound to give e certificate to the person whose name appeared in the ceipt. (The learned Judge has written "certificate," but is obvious that the witness meant "receipt" where certiate is first written); and that if the receipt was issued cording to the practice of the company, the receipt-holder uld be entitled to the certificate.

We are clearly of opinion that, upon this evidence, the rned Judge was right in finding the issue for the plaintiff. ie plaintiff appears to have been ready and willing and lo to do all that was necessary to make the defendant the gal owner of the shares; and as no question was raised, ther in the Court below, or on the argument of this appeal, to the propriety of granting specific performance of con-cts of this nature, and, as the plaintiff has not been guilty lâches or misconduct, we confirm the decree with costs.

Decree affirmed.

Attorneys for appellant: *Dallas, Lynch, and Langdale.*

Attorneys for respondent: *Acland, Prentis, and Bishop.*

Original Suit No. 828 *of* 1865; *Appeal No.* 45.

MAGANBHA'I HEMCHAND.....*Plaintiff and Appellant.*
MANCHHA'BHA'I KALLIA'NCHAND, *Defendant and Respondent.*

Sale of Shares for future delivery—Readiness and willingness—Act XIX. of 1857, *Secs.* 18 *and* 19—*Omission to try issue—Remand.*

In a suit to recover damages for the non-acceptance of shares, where the vendor had contracted to execute proper transfers, and do all other things necessary on his part to transfer the shares, and to bear the expense of such transfer:—

Held on the issue—whether the plaintiff was ready and willing to perform his part of the contract—that it was sufficient to show that he had in his possession, at the time fixed for the performance of the contract on his part, such certificates of the shares contracted to be sold as were required by the law, and that he tendered the same with a deed of transfer to the purchaser; and that it was not necessary for the vendor, before handing over the documents to the purchaser, to effect the transfer; but that it was the duty of the purchaser himself, in such case, having accepted the shares, to have the transfer made into his name in the books of the company.

The finding of the court below on the first issue being, therefore, reversed; the suit was remanded for trial of the issue—whether the contract was a wagering one—the Judge having omitted to determine that, and the defendant not having given evidence upon it, in consequence on the first issue being found for him on the evidence given by the plaintiff.

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APPEAL from the decision of Mr. Justice ANSTEY.

The Original Suit was tried in a Division Court on the 18th and 19th of December 1865, when judgment was given for the defendant.

The Advocate General (*Hon'ble L. H. Bayley*), in opening the case for the appellant, plaintiff in the original suit, stated that he was the vendor of two shares in the Mazagon Reclamation Company which were contracted to be delivered to the defendant on the 1st of July; the contract containing a provision that, in the event of the purchaser not accepting delivery on the date specified, the vendor should have the option of selling the shares on his account, which he did, and the defendant was sued for the difference between the price at which the shares were sold and the contract price. The defence set up was a failure on the part of the vendor to complete his part of the contract at the appointed time, and the

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provisions of the Wagering Act. There were two contracts sued upon, the first of which did not specify any particular share, and was simply for the purchase and sale of a share in the Mazagon Reclamation Company; the second related to a particular share, the number of which was inserted in the contract. It was proved that when the contracts were entered into, there only existed what was known as scrip, representing the shares of the company, and that the books of the company were not opened until the 29th of June; and also that the plaintiff was on the 1st of July possessed of two shares, one of them being the particular share mentioned in the second contract; and that he tendered these shares with all the title procurable at the time for the defendant's acceptance.

The learned Judge who heard the case seemed to think that the plaintiff was bound to supply a full and valid title to the shares contracted for at the time agreed upon, otherwise the action must fail; and he was of opinion that no such title could be shown on the 1st of July—there being no proper register of shareholders or transfer books kept by the company up to the end of June, and the only book produced purporting to be such a register being what was called a "stock ledger." The Judge quoted *Humble* v. *Langston* and several of the old South Sea cases, which were not applicable to the case. A witness who acted on behalf of the defendant stated that he did not remember what the documents were which were tendered on behalf of the plaintiff, but that the stamp was objected to as insufficient, and on this account the shares were rejected. The learned Judge added that the law of England was in accordance with his view of the case, as was shown by the decisions he quoted, and that there was nothing in the climate or the colour of the inhabitants of Bombay to warrant a different interpretation of that law here to that which had been put upon it in England for the last hundred years. The neglect of the company to keep books, as they were naturally expected to do, and the neglect of the plaintiff to take the unusual course of suing out a *mandamus* against them to compel

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them to do so, was (the Judge said) fatal to his case, and he must, therefore, suffer the loss which resulted from such neglect.

The Advocate General went on to state that the evidence of the plaintiff's munim showed that he had in his possession, on the 29th of June, letters of allotment relating to five shares in the Mazagon Company, and that he exchanged these for share certificates between that date and the 1st of July, when he offered, in the presence of Mr. Tyabji's clerk, two of the certificates to the defendant for acceptance, and they were refused, not because they were not the proper documents, but because the stamp was insufficient, a defect which he offered to remedy at once. There was no question raised as to the validity of the documents, and the only discrepancy in the evidence occurred with regard to the place at which the tender was made, one of the witnesses saying it was at the house of the defendant, and another that it was at another house a short distance from it. [COUCH, C. J.:—Then you tendered share certificates, not scrip, for the shares mentioned in the contract.] Yes. The five letters of allotment which the plaintiff held were produced in court by the clerk of the company, to whom they had been returned in exchange for share certificates such as were to be had at the time. These were, it had been shown in evidence, considered as shares, and treated as such in the market at the time. They were not produced in court, having been sold by the plaintiff; but the fact of the production of the letters of allotment by the company proved that certificates had been issued in respect of those letters. The requisite tender had been made with all the title procurable at the time. [The Advocate General here read extracts from the evidence.] There was no evidence called to rebut this testimony, and no cross-examination took place as to the nature of the documents tendered, which were only required by the Act to be documents bearing the common seal of the company, and stating that the plaintiff was the holder of so many shares, and there was sufficient evidence to prove that the requirements of

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the law had been complied with. [Here it turned out that the evidence of the company's clerk had been cancelled by the Judge, in consequence of his stating that the book was the stock ledger, and of Mr. Howard's saying that he did not intend to put it in evidence. Their lordships remarked that the Judge had no right to cancel this evidence. Being evidence of the contents of a document which was not in evidence, its reception might have been objected to; but having been received, it could not be cancelled.]

Howard, on the same side, contended that the burden of proof, that the title was an invalid one, lay with the defence; and as the defendant shirked the witness-box, that circumstance would weigh with the Court, which would not require so strict a proof of valid title under such circumstances, as where evidence had been called to rebut the title, there being in this instance not even cross-examination against it.

Pigot, for the respondents, contended that there was no proof of the things tendered being what was specified in the contract, and that such proof was essential to the plaintiff's case. There was the evidence of the plaintiff's munim to show that he had in his possession on the day in question only five Mazagon shares, two of which belonged to customers, one to another person whose name he gave, and another to himself as distinguished from his master; thus leaving him in possession of only one share of the five wherewith to fulfil a contract which was for two shares.

COUCH, C. J.:—There was no proof that he had not power to sell any of the other shares, and no cross-examination on the point.

Hayllar, on the same side.—One of the issues raised was whether the contracts were null and void under the provisions of the Wagering Act, a point which was barely mentioned at the hearing, as the learned Judge expressed himself so

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strongly in our favour on the point of readiness and willingness, that we thought it unnecessary to take up his Lordship's time by going into evidence on the second issue. [COUCH, C. J.:—The result shows that it does not always shorten cases of this kind to refrain from going into the whole of the evidence. Do you contend that there was sufficient evidence before the Court to find on the issue raised under the Wagering Act?] We could hardly contend that, as it would be unfair to the opposite side to deprive them of the opportunity of cross-examining on the point, but if the Court thinks that there was sufficient evidence on the first issue to warrant a finding for the plaintiff, we should ask it to consider whether there was not sufficient evidence on the learned Judge's notes to justify it in calling from the defendant for further evidence on the second issue, under Sec. 355 of the Code. The issue was not abandoned at the trial, and was not pressed, simply on account of the strong expression of opinion on the part of the learned Judge, and we should, therefore, ask the Court either to send the case back for further evidence on that issue, or to hear such evidence itself.

COUCH, C. J.:—Section 354 gives the Court the power of sending the case back if the Judge below has omitted to determine an issue.

The Advocate General in reply:—It appeared to me that the point was abandoned. [COUCH, C. J.:—On the contrary it appears to have been mentioned by Mr. White.] If the company broke the law, by not keeping a register, a contingency that could not enter into the minds of the contracting parties, they were amenable to the law for their neglect, and that neglect ought not to be allowed to operate to the prejudice of others in the position of the plaintiff, who had done, as had been shown, all that lay in his power to fulfil his part of the contract, and was only unable to put the name of the defendant on the register because no such register existed.

COUCH, C. J.:—In this case the learned Judge before whom the suit came for hearing framed three issues:—(1) whether

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the plaintiff was ready and willing to perform his part of the contracts, which formed the basis of the plaint, at the time fixed, viz., the 1st of July; (2) whether the contracts were null and void under the provisions of the Wagering Act; (3) whether the defendant was indebted as mentioned in paragraph 6 of the plaint. The second of these issues was not tried, and the third appeared to have been introduced with reference to earnest money, as stated to have been paid in the sixth paragraph of the plaint, and with reference to some accounts between the parties.

The material question for the determination of this court is, whether the first issue was properly found for the defendant. The allegation on the part of the plaintiff was that all was done by him which he was bound to do for the due fulfilment of his part of the contract, but that the defendant would not accept. The issue was—whether the plaintiff was ready and willing to perform his part of the contract. It appears to me that on the 1st of July, which was the time fixed by the contract for performance on the part of the vendor, he had in his possession such certificates as were required by the Act, and that these were of such shares as he was entitled to sell or make a transfer of; and the fact of these standing at that time in his name was *primâ facie* evidence of his title, according to the provisions of the Act, by which "the transferror shall be deemed to remain a holder until the name of the transferree is entered in the register book in respect thereof" (Act XIX. of 1857, Sec. 18); and, although the company had no transfer book, they had issued certificates which were *primâ facie* evidence of the vendor's title, and it had been shown that these were in his possession at the time fixed in the contract, and that he offered them for the acceptance of the defendant.

I do not think there is any evidence of the insufficiency of the stamps, there being no further proof than a remark made by one of the witnesses, which might or might not be well founded; and, if they were insufficient, that was a defect which might have been easily remedied, and it appears that the vendor offered to do this at the time. I, therefore, think

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that no valid objection can be made to the tender on that ground.

The vendor appears to have had the necessary documents in his possession on the 1st of July, and to have been prepared to do all in his power to transfer the shares to the purchaser. It was important that the terms of the Act required that the transfer should be entered in the books of the company, and that the shares would remain in the name of the vendor till this was done. By the contracts the vendor agreed to do all things necessary on his part to enable the purchaser to effect the transfer, and to bear the expenses of it. The question, then, was, what was necessary to the transfer? Was it necessary only to execute a transfer deed, and to hand it over with the shares to the purchaser? or was it necessary to go further and enter the transfer in the books of the company before handing over the documents? To my mind there appears to be no doubt as to the law on this point, that where the vendor has transferred the shares to the purchaser, executed the deed of transfer, and delivered it over to the transferree, it becomes the duty of the latter to go to the office of the company and get the transfer made into his name.

The contracts in this case did not engage that the transfer should be executed by the vendor, but that he would render all the assistance in his power to get the transfer effected, and bear the expense of such transfer. The learned Judge below, however, appeared to think otherwise, and seemed to be of opinion that the vendor had engaged to get the transfer registered int he company's books, and that until this was done he would not have performed his part of the contract. If this were so I think that the vendor would be responsible for the performance of such a condition; but it appears to me that such were not the terms of the contract, and that the vendor was ready and willing to do all that he was required by it to do. There was no evidence to prove that he was not ready, if necessary, to join legal proceedings to compel the company to register the shares in the manner required by law, and he showed, by presenting the shares,

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that he was ready to perform his part of the contract. I think, therefore, that the issue should have been found for the plaintiff.

There was another point mentioned which I think ought to be noticed, viz., that the vendor was not in a position to transfer the shares before the 1st of July. If the vendor had been called on to transfer the shares, upon payment of the purchase money *before* the 1st of July, and had failed to do so, he would have broken his contract, and could not afterwards have enforced it. But if the purchaser allowed the whole of the time to elapse before making such a demand on the vendor, it was sufficient for the latter to show his readiness and willingness to perform his part of the contract *on* the 1st of July, and I think it was not necessary for him to show that he was in possession of the shares before that time.

On these grounds I am of opinion that the finding of the learned Judge on the first issue must be reversed.

The second issue has not been decided; and what has taken place regarding it appears to be this, that the learned Judge intimated so strongly his opinion that the case must be decided for the defendant on the other issue that his counsel refrained from offering evidence upon it. There was nothing in the conduct of the learned counsel in the matter to bind him to the case as it now stands; and the suit must be remanded to be tried on the second issue in one of the Division Courts. It will be open for both parties to produce evidence. As the case will come again before this court after the issue has been decided, we shall reserve the question of the costs of this appeal.

WESTROPP, J., concurred.

Decree reversed and suit remanded.

Attorney for appellant: *C. Tyabji.*

Attorneys for respondent: *Dallas, Lynch, & Langdale.*

Original Suit No. 1209 *of* 1865.

CHHABILA' MA'NCHAND and GOVARDHAN MA'NCHAND, *Plaintiffs.*

v.

JADA'VBA'I, widow of Zummakrám Náná; (2) BECHAR ZUMMAKR'AM; (3) VITTHAL ZUMMAKRA'M, infant sons of Zummakrám Náná, represented by defendant No. 1—their mother—sued as their guardian; (4) and (5) JAGJI'VAN BHOTU and AMBA'BA'I, his wife, the granddaughter of Chhagan Govind; (6) JETHIBA'I, widow of Govind As'árám; (7) JADA'VBA'I, widow of Mánchand Bechar, and mother of the plaintiffs; (8) DEVKU'VARBA'I, widow of Ranchhod Bechar. } *Defendants.*

Hindú family property—Evidence of Partition.

The fact of the members of two branches of a Hindú family being separate in food and worship is quite compatible with their never having been separate in estate.

A document providing separate house accommodation for the members of each of the two branches points rather to a division of enjoyment than to a division of ownership or estate.

The absence of attestation by castemen to documents, by which a Hindú affects to deal with his property as though he were separate in estate, is a circumstance which throws suspicion on the fact of an alleged separation; as the presence of such would be satisfactory evidence of a state of things generally believed to be true at the time.

Bequest of property in *dharm* to the Caste.

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THIS suit was brought by the plaintiffs, as the sole surviving male members of an undivided Hindú family: claiming to be entitled to the entirety of a dwelling-house and premises, situated in Cross Row at Mumbádeví in Bombay, subject to the right of defendants Nos. 6, 7, and 8, respectively, to maintenance; and, failing that relief, that the shares and interests of the plaintiffs and defendants respectively therein may be ascertained and declared by the court.

Mayhew and *Reid* for the plaintiffs.

The Advocate General (*Hon'ble L. H. Bayley*) and *Green* for the first, second, and third defendants.

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The other defendants did not appear; but, due proof having been given of their having been respectively served with process under the provisions of Sec. 60 of the Code of Civil Procedure, the hearing of the suit proceeded as against all the defendants; and the following issues were framed:—

(1) Whether Bechar Govind and Chhagan Govind became separate in estate, as in the 2nd paragraph of the written statement alleged, or at any, and if so at what, subsequent time; (2) Whether the dwelling-house and premises claimed in the plaint were purchased by Bechar Govind and Chhagan Govind, as in the 3rd paragraph of the written statement alleged; (3) Whether the plaintiffs are entitled to the entirety of the said dwelling-house and premises, as claimed in their plaint; (4) Whether the first, second, and third defendants, or any of or either of them, are entitled to any, and if so to what, part of the dwelling-house and premises claimed in the plaint.

The facts are fully stated in the judgment.

In the course of the argument the following authorities were cited:—*Roe* v. *Pattison* (*a*); *Doe dem. Booley* v. *Roberts* (*b*); *Thomson* v. *Shakspear* (*c*); *Paton* v. *Randall* (*d*); *Morice* v. *Bp. of Durham* (*e*); *Nicholls* v. *Butcher* (*f*); *Lake* v. *Craddock* (*g*); *Sreemuty Anundomohey Dosee* v. *Doe* (*h*); *Doe dem. Mackenzie* v. *Pestonji* (*i*); *Ahbáchári* v. *Rámachendrágga* (*j*); *Webbe* v. *Lester* (*k*); 4 Cruise's Digest, 244 *et seq.*; Taylor on Evidence, 4th ed., p. 553 *et seq.*; Strange's Hindú Law, *passim*.

Cur. adv. vult.

(*a*) 16 East 221. (*b*) 11 A. & E. 1,000. (*c*) 6 Jur. N. S. 182.
(*d*) 1 Jac. & W. 189. (*e*) 9 Ves. 399. (*f*) 18 Ves. 193.
(*g*) 1 Wh. & Tu. L. Ca. Eq. 120. (*h*) 8 Moore, Ind. App. 43.
(*i*) Perry, Or. Ca. 531. (*j*) 1 Mad. H. C. Rep. 393.
(*k*) 2 Bom. H. C. Rep. 55.

NOTE.—As to the Hindú Law on the Evidence of Partition, *see* 1 *Strange, H. L.*, pp. 225-230 (chap. 9, § 4),—citing the *Dáya-bhága* of *Jímúta-vahan*, Chap. XIV.; the *Mitákshará* of *Vijnyánesvara*, Chap. II., Sec. XII. (quoting *Yájnyavalkya*, 2,1 50, *Nárada*, 13, 35-40, *Manu*, 3, 69); the *Vyavahára Mayúkha*, Chap. IV., Sec. VII., § 27 *et seq.*; and 2 *Strange, H. L.*, 387-398, containing Remarks by *Colebrooke* and *Ellis*.—ED.

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ARNOULD, J.—The plaintiffs and defendants in this suit are members of the Soni (or goldsmith) caste, and most of them natives of Pirán-Pattan, a town in the dominions of His Highness the Guicowar, some sixty miles or so north-west of Ahmedábád, standing on the site and among the ruins of the once famous city of Anhilwár or Anhilpur, the capital of an early Hindú dynasty of Gúzerát kings (whose history, together with that of Pirán-Pattan or Anhilwár, is told in a very interesting manner by my late lamented colleague, the Hon'ble A. Kinloch Forbes, in his learned and ingenious work the "Rás-Málá"). Pirán-Pattan is now comparatively a decayed place, but it is still, as it always was, remarkable for the ingenuity of its artificers, especially of its workers in gold and silver and its setters of precious stones (*jadia*). Many of these artizans belonging to the Soni or goldsmith caste, come to make money by the exercise of their craft in "the great and prosperous seaport town of Bombay"—returning in their mature age, to enjoy what they have thus earned, to their native city of Pirán-Pattan.

The head of the family to which the plaintiffs belong was Govind As'árám, a native of Pattan, of the Soni caste, who, after having long practised his trade in Bombay, returned to his native city, and died there about A. D. 1825. Govind As'árám left two sons, Bechar Govind and Chhagan Govind, and also a widow, Jethibái, who still survives, and is the sixth defendant on this record. Of his two sons, Bechar Govind (who was by some fourteen or fifteen years the elder) died at Pirán-Pattan about 1850. Chhagan Govind also died at the same place about 1860. The great question in the present suit is, whether these two brothers were divided or undivided in estate.

It will be necessary, in order to understand the case, to state briefly the steps of the family descent from these two brothers, Bechar Govind and Chhagan Govind. Taking Bechar Govind's branch first: Bechar himself, as already stated, died about 1850, leaving two sons, Mánchand Bechar and Ránchhod Bechar. Mánchand Bechar died about 1853,

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leaving a widow, Jadávbái (the seventh defendant in this suit), and two sons by her, Chhabilá Mánchand and Govardhan Mánchand, who are the two plaintiffs in this suit. Ranchhoḍ Bechar died very shortly after his brother Mánchand, leaving no issue, but a widow, Devkuvarbái (the eighth defendant in this suit). The plaintiffs, therefore, are the sole surviving male representatives of the family of Govind As'árám in this branch; being the grandsons of Bechar Govind, and the great grandsons of Govind As'árám. Next taking the branch of Chhagan Govind, the younger of the two sons of Govind As'árám. Chhagan Govind had only one son, Magan Chhagan, who died before his father, leaving one daughter, Ambábái (who and her husband, Jagjívan Bhoṭú, have been respectively made defendants 4 and 5). Ambábái is thus the grandaughter of Chhagan Govind, and the plaintiffs are his grandnephews, the grandsons of his brother Bechar Govind.

As I can find no authority in Hindú law for the position that a grandaughter, as such, can inherit, it appears to me that Ambábái can have no claim by way of inheritance as against the plaintiffs, and this quite independently of any opinion the Court may form on the point as to the brothers Bechar and Chhagan having been divided or undivided in estate. The plaintiffs, as the grandsons of Bechar and grandnephews of Chhagan, are the nearest surviving male representatives of both these brothers, whether divided in estate or undivided, and accordingly as the evidence in the case shows, Chhabilá, as the elder of the two, lit the funeral pile and performed the funeral ceremonies both of his grandfather Bechar and of his granduncle Chhagan. Whether the plaintiffs are entitled or not to inherit Chhagan's share as well as Bechar's share in the family property, depends on the question—which is a question of evidence—whether Chhagan or Bechar were or were not divided.

But, to resume the narrative of Chhagan's branch: Chhagan, as already stated, died at Pirán-Pattan in 1860.

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He left behind him two widows, Gúlábbái, by far the elder (who died in 1862), and Putlibái, a young widow (who died in 1864). Putlibái was the daughter of Zummakrám Náná, a Soni of Bombay. Chhagan married her at Bombay in 1856 (about four years before his own death), and on his marriage with her executed a document (exhibit No. 1 in the suit) by which (dealing with his property as though he had been separated in estate from his deceased brother Bechar) he gave all his property in absolute ownership to his two wives, Gúlábbái and Putlibái, and failing a son, to the survivor. Putlibái, the surviving widow, made her will on the 13th of June 1864, leaving Chhagan's property at Pirán-Pattan to his grandaughter Ambábái, the fifth defendant, who resides there, and the property in Bombay (including the house and premises of which the plaintiffs in the present suit claim the entirety) for such "good purposes" as her father Zummakrám and "the whole Sonis in Bombay should think proper." Zummakrám Náná, who was left sole executor of this will, died soon after Putlibái (January 1865). He seems to have entered into possession as heir of Putlibái, and his widow Jadávbái and her two infant sons are the first, second, and third defendants on the record. They are only nominal defendants; the suit is really defended by the Soni caste of Bombay, who, under the residuary disposal in Putlibái's will, consider that they have a claim on the residuary estate for caste purposes, and with this view have imposed a contribution of Rs. 10 on every head of a house in the Soni caste in Bombay, visiting non-payment with the penalty of outcasting.

The plaintiffs originally instituted their suit so far back as September 1864. That suit and also an intermediate suit, filed in September 1865, were both withdrawn, from difficulties as to the proper parties to make defendants (under Sec. 97, Civil Procedure Code); and finally the present plaint was filed on the 9th of December 1865. The property to which in this suit the plaintiffs claim to be entitled, consists of a dwelling-house and premises "in Cross Row, near Mumbádeví," which, as alleged in the 4th para. of their plaint, was

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(together with another neighbouring house in the same part of the Native Town) purchased in A. D. 1842 by Bechar Govind and Chhagan Govind in their joint names, *partly out of monies and moveables of their father, Govind As'árám, which had come to them on his death,* and partly out of monies acquired by them in a partnership business which they had carried on, and, at the time of the purchase, still continued to carry on, in Bombay as goldsmiths and jewel setters (*jadia*).

The plaint, after setting out the relations of the family as already detailed, alleges, in its 16th and 17th paras., that the plaintiffs, " as the sole surviving male members of an undivided Hindú family," are entitled to the entire of the dwelling-house and premises, so jointly purchased as alleged by the brothers Bechar Govind and Chhagan Govind in 1842, subject to the right of maintenance of Jethibái, the widow of old Govind As'árám (defendant No. 6) of Jadávbái, the widow of Mánchand Bechar and mother of plaintiffs (defendant No. 7), and of Devkúvarbái, widow of Ranchhod Bechar and paternal aunt of plaintiffs (defendant No. 8). Subject to these admitted rights of maintenance, the plaintiffs pray that they may be declared entitled to the entirety of the dwelling-house and premises the subject of the suit, or, failing that, that the Court will declare the rights and interest of the plaintiffs and defendants respectively.

The written statement, put in nominally by the first defendant, Jadávbái, for herself and the second and third defendants (really by the Soni caste of Bombay), alleges in its 2nd para. that Bechar Govind and Chhagan Govind became separate in estate in August 1830, and executed mutual releases. In the 3rd para. it alleges that the dwelling-house and premises claimed in this suit were purchased by Bechar and Chhagan, not out of, or by means of, any ancestral estate, but by monies contributed by them in equal shares, and which belonged to them respectively as separate property; that the rents of the property so purchased were divided equally between Chhagan and Bechar till Bechar's death—then between

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Chhagan on one side and Mánchand and Ranchhod Bechar on the other; that on the death of Mánchand and Ranchhod the plaintiffs succeeded to their share, and that since the death of Chhagan a similar division of the profits has been made between plaintiffs and the widows of Chhagan. In its 4th para. the written statement alleges that under the will of Chhagan Govind, dated 9th of April 1855, and a codicil thereto, dated 25th of October 1856, his two widows, Gúlábbái and Putlibái, became absolutely entitled, on his death (which took place on or about the 18th of October 1860), to his share and interest in the property claimed in this suit. It then avers that Putlibái survived Gúlábbái, and thus became entitled to the whole of Chhagan's share; that Putlibái by will bequeathed her interest to her father, Zummakrám Náná, and appointed him her executor; and that the first, second, and third defendants claim to be entitled to such interest as the heirs either of Zummakrám Náná, *or of Putlibái*, and deny that the plaintiffs are entitled to the *entirety* of the dwelling-house and premises, the subject of this suit.

The principal question in the case was that raised by the first issue, viz., whether Bechar Govind and Chhagan Govind ever became separate in estate. That they were separate in food and worship was abundantly shown by the evidence, but this is quite compatible with their never having been separate in estate. The evidence adduced to show that they were separate in estate was—(1) *oral*: consisting of caste reputation as to their having been separated, and of declarations alleged to have been made from time to time by the two brothers to their caste-fellows—that they were separate, had executed releases, &c.: (2) *documentary*, which principally rested, first, on an alleged release of the 16th of August 1830 (exhibit No. 3); secondly, on an English deed of conveyance of 30th of April 1842 (exhibit No. 4); thirdly, on two documents of 9th of April 1855 and 25th of October 1856, put forward and relied upon by the defendants as respectively the will and codicil to the will of Chhagan Govind (exhibits 1 and 2); fourthly, on two documents, both dated 29th of April 1861, showing an equal division, after Chhagan's

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death, of the rents and profits of the property in dispute between the plaintiffs and Chhagan's widows.

Now, as to the oral evidence, in so far as it consists of evidence of alleged reputation in the caste, it is, in my judgment, rendered of extremely little, if of any, value, by the clear proof that has been given that the real defendants in this suit are the Soni caste in Bombay. Witness No. 8, a witness, and a zealous one, for the defence, said in cross-examination to Mr. *Mayhew*: "You do not know; the counsel for the widow and children are really fighting for the 'Dharm'—for the caste—not for the half-share of the widow and children;" and he then explained, "There has been a caste meeting in Bombay about this suit. Chhagan's will (exhibit No. 1) and a will of Putlibái (exhibit No. 7) were produced; and they said the property was given in 'Dharm' to the caste, and told Chhabilá (the elder of the plaintiffs) to consent to the property being so given. Chhabilá declined. The caste outcasted Chhabilá and Govardhan, the whole of Bechar's branch, and they got hold of Zummakrám Náná (the deceased husband of the first defendant), who was present at the caste meeting. Rs. 10 was fixed as a sum to be paid by each family in the caste to carry on this litigation. Chhabilá's uncle (*i. e.*, witness No. 12, the brother of the plaintiff's mother) would not pay the Rs. 10, and so they turned him out of caste." With the exception of this witness, who was called for the plaintiffs, it appeared that all the Soni witnesses had paid this Rs. 10—one of them, also a witness for the plaintiffs, who had been outcasted on a first refusal to pay, had paid it as the price of his re-admission into caste. Under such circumstances as these it would obviously be out of the question to place dependence on such statements as those made by the witnesses called for the defence, to the effect that the separation of the two brothers was well known in the caste, and that the two brothers had, on different occasions, spoken of their having been separated and executed releases. Such evidence, always vague and unsatisfactory, becomes, in my opinion, quite valueless under the circumstances disclosed in this case.

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Turning to the documentary evidence, the first document in point of date is that of the 16th of August 1830 (exhibit No. 3). It is relied upon by the defendants, either as in itself constituting a "phárkhat" or release between the two brothers, or as evidence that a separation in estate had then already taken place between them. It is a very obscure document, and, indeed, unintelligible, without reference to the then state of the family and the family dwelling-place or dwelling-places as disclosed in the evidence. From the evidence it appears that Govind As'árám, the father of Bechar and Chhagan, owned two houses in Pirán-Pattan (occupied by him during his life-time, according to the evidence, as one house). These two houses stood back to back, having their fronts in two parallel streets. The streets in Pirán-Pattan generally terminate at one end in a *cul-de-sac*—at the other end there is a high archway with a gate which can be closed at pleasure, thus making each separate street a sort of separate fortress. The town houses in Gújarát (according to ground-plan inserted at Vol. II., p. 254, of that excellent work "Rás Málá," already cited) are almost all built on one model. They are entered from the street by a few steps on each side of which is a small terrace or *otlah*. Then comes a large apartment, and then an open court with a water-tank in the centre and a cook-room at the side; beyond this at the back of the open court-yard are other rooms and storehouses. Most of the houses have an upper storey reached by a ladder to the right of the groundfloor entrance, and the front rooms of the upper storey communicate with the back rooms by a passage running under an awning—a sort of covered gallery along one and sometimes along both sides of the centre open court. The evidence is, that the two houses standing back to back which belonged to, and were occupied by, Govind As'árám down to his death, were each of them built on this plan, and that there had originally been a communication on the groundfloor from the back of one house into the back of the other, which had since been filled up, and also a communication from the upper storey of one house to the upper

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storey of the other, which latter communication has been throughout in constant use by the members of the two families, and is still existing. In one of these two houses thus communicating with one another in the rear—in the house, viz., that had its main entrance in Khiji-páḍá-kiḍki street, lived, after Govind's death, the elder brother, Bechar, and his family; in the other, which opened on the parallel street of Kháki-páḍá-kiḍki, lived Chhagan and his family. But, besides the two brothers and their families, there was Jethibái, the widow of Govind As'árám—the stepmother—to be accommodated. Now the stepmother in a Hindú family suddenly descending from the position of mistress of a household into that of member of a family in which there are other and younger mistresses, is apt to be a very considerable domestic affliction; "as a general rule," said witness No. 10, "admitting of no exceptions, stepmothers quarrel with the rest of the family." "No one," said witness No. 8, "could bring his stepmother inside the same house as his wife." Now, the document of 16th of August 1830 (exhibit No. 3) appears to have been made with the primary intention of providing Jethibái with separate quarters consisting of the whole upper storey of Chhagan's house (the house opening into Kháki-páḍá-kiḍki). Chhagan, who was some twelve or fifteen years the younger brother, and who seems never to have had any child except Magan, was to occcupy the groundfloor in the Kháki-páḍá-kiḍki house, and, in consideration of his giving up the whole of the upper storey of that house to Jethibái, he was to have a room in the upper storey of Bechar's house, and the enjoyment of half the terrace and half the awning (or covered gallery) of Bechar's house, and he was to have exclusive use of the tank in the open court of the Kháki-páḍá-kiḍki house. After Jethibái's death Chhagan was to give up the accommodation thus provided for him in Bechar's house, and "each was to have what belonged to each." During Jethibái's life the brothers "were *jointly* to serve her," (that is, I presume, jointly to maintain and provide for her) and then follows this obscure clause:—"On the death of Jethibái, whatever property there is, the

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two brothers are jointly to spend: whatever surplus there may be, they may divide and take." After several endeavours I have been obliged to give up as hopeless the attempt at putting a clear construction on this sequence of words. If it means anything, it must, as it seems to me, mean this: the two brothers on Jethibái's death are jointly to enjoy the immoveable and to divide the moveable property. But I am by no means sure that this is the meaning. The document closes with the words, "None shall treat Báí Jethá with disrespect." Now, I confess I am unable to look on this document as in itself a writing of release between the brothers; from beginning to end its primary object seems to have been to provide accommodation for Jethibái, on terms which, as between the two brothers, were fair and equitable. I cannot either regard it as conclusive, or even as strong as evidence, that the two brothers had, before its execution, become separate in estate; the expressions it contains as to either brother having respectively nothing to do with the house of the other, having no claim or title thereto, &c., pointing in my mind rather to division of enjoyment than to division of ownership or estate. I think it does show, and that clearly, that so far back as 1830 Bechar and Chhagan were separate in food and worship, and that they separately occupied the respective houses, which have ever since been separately occupied by their respective families and descendants; but I think it would be giving an undue weight to the expressions used in this obscure and ill-framed document to rely on them as proving that the two brothers *were separate in estate*. It is to be observed that, from the evidence, the arrangement effected or sanctioned by this document did not last long: whether it was that Chhagan found the accommodation afforded him in Bechar's upper storey unsatisfactory, or that both brothers found the near vicinity of the stepmother, though lodged on a separate floor, unendurable—does not appear; but it does appear that, not a very long time after exhibit No. 3 was executed, the two brothers placed Jethibái in another house, which they bought jointly, as it seems on the

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evidence, for her accommodation, in another quarter of the town of Pirán-Pattan, in a street called Andaya Savadiá's-kiḍki, where she still resides, or is still maintained, as it would appear, out of the estate.

The next document in point of date is the deed of 30th of April 1842 (exhibit No. 4). Apart from the vague oral caste evidence of hearsay and reputation, which, for the reasons already stated, I regard in this case as valueless, there is nothing to show separation of the brothers in estate between 1830 and 1842. According to my view of the evidence, it is not shown that the two brothers were divided in estate when the English deed of 30th of April 1842 was executed. This deed is a conveyance to the two brothers jointly in fee "to and to the use of Bechar Govind, Chhagan Govind, their heirs, and assigns for ever," of two houses in Mumbádeví, one of which is the subject of the present suit. There is nothing on the face of the deed to show that the consideration money was paid by the brothers *in equal shares*, nor is there anything in the evidence directly leading to that inference; though, from the equal division of rents and property that is subsequently shown to have taken place between the two branches of the family, it may reasonably be assumed that they were to take an equal, though not therefore necessarily a divided, interest in the purchased property. Then from what sources was the purchase money derived? Was it exclusively from the profits of the partnership, which the two brothers had been carrying on for some time before this deed was executed, or was it also in part from the ancestral fund which they had derived from their father, Govind As'árám? The fair result, in my opinion, of the evidence is, that a part at least of this purchase money was derived mediately, if not immediately, from their father, Govind As'árám. One of the few reliable witnesses in this case was the old witness No. 12, who was called for the plaintiffs; he resisted for six months the payment of the caste contribution of Rs. 10—he was turned out of caste in consequence, and only paid it as a means of getting re-admitted to the caste. This old man knew Bechar and Chhagan when they first came down to

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Bombay, and he says expressly that "they carried on business together on their father's money." He was in Pirán-Pattan when Govind As'árám died there, and he represents Govind as having left a considerable sum, adding, "It was said each brother received for his share Rs. 15,000," by which it is plain he must have meant that the share of each brother amounted to that sum; not that any formal division of estate then took place between the brothers: for a moment after he added in answer to a question by the Advocate General, "How can I tell whether in estate they (the two brothers) were separate or joint." On the whole I think the fair conclusion from the evidence is, that the purchase money for the houses conveyed by the English deed of 1842 came in part, either mediately or immediately, to these two brothers as joint and undivided in estate, from their father, Govind As'árám.

An attempt was made, but scarcely a serious one, to argue that this deed of 1842, being an English conveyance, should be construed, according to its strict legal effect, as clothing the purchasers with all the incidents of joint tenancy according to the English Common Law; and, therefore, as giving the whole estate on Bechar's death to Chhagan, the survivor of the two brothers. It is sufficient to say (1) that, under the new Charter, this court is a Court of Equity as well as of law, and that to give such an effect to a document between natives—merely because it is in English, and prepared according to the forms in use with English conveyancers—would be, in the highest degree, inequitable; (2) that under the old Charter, which in this respect is in force, this court is bound in questions of inheritance between Hindús to determine their rights with reference to their own laws and usages, and not according to the technicalities of English law. No one can for a moment suppose that these two brothers, when they took a conveyance in this form, ever meant or intended that the survivor of the two was to have the whole estate; the subsequent course of dealing between the parties shows this most plainly. The utmost claim ever put forward by those who represent

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Chhagan is, that they are entitled to a separate half of the estate, and even in their written statement filed in this suit the defendants admit the plaintiffs' claim to Bechar's share, and only deny that they are entitled to Chhagan's also. It appears to me that as, according to the view I take of the evidence, the two brothers are not shown to have been divided in estate prior to the execution of the conveyance of 1842; so there is nothing in that conveyance itself, nor in the circumstances under which, on the evidence, it would appear to have been made, either to operate a division of estate between the two brothers, or to afford any proof, presumptive or otherwise, of such a division. If anything, it leads to the inference that the brothers who, in my view of the evidence, are not shown to have been divided in estate when this deed was executed, intended that the property they acquired under the deed should be owned and enjoyed by them jointly and undividedly. But, at all events, the execution of such a deed as this can in no view, according to my judgment, lead to the contrary inference, or tend to show that the brothers, if undivided in estate before it was made, became divided in estate upon its being made.

The next documents of importance are exhibits Nos. 1 and 2, dated respectively the 9th of April 1855 and the 25th of October 1856. The defendants wished to put these forward respectively as a will and codicil of Chhagan Govind, but, as I intimated in the course of the hearing, the first is, in my view, a mere marriage settlement, and the second a confirmation thereof. The first document is addressed by Chhagan to Zummakrám Náná, the father of Putlibái, the bride: after reciting that the customary marriage presents are to be given and received, that Gúlabbái, his present wife, is forty-five years of age, that there is no child (*i.e.*, as the translator says it may mean "no surviving child by the marriage"), and that he has therefore married Zummakrám's daughter (for the marriage is spoken of in the writing as though it was prior, though the evidence shows it was subsequent, thereto); Chhagan proceeds to give "all his property to his two wives in the event of his decease," and provides that "should a

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son be born to him, such son is to be the heir of his two wives." Exhibit No. 2 simply confirms exhibit No. 1.

It is clear that, unless Chhagan was divided in estate from Bechar when he executed these two writings, they could not operate (as if then separated in estate from Bechar they, in my opinion, would operate) to give his whole property to his two wives in absolute ownership. If he was then joint in estate with Bechar, no interest in his undivided moiety would pass by these writings. This is admitted, but then it is contended that the very execution of such writings by Chhagan, and the act of his caste-fellow Zummakrám in giving him his daughter to wife on the faith of the representations they involve of Chhagan's being then separate, and having an absolute disposing power over his share of the family property, is itself strong evidence that Chhagan was, and was known in the caste to be, separate from Bechar. The force of this inference depends entirely upon the circumstances under which the writings were executed. Let us see what these were. In 1854, the year before the first of these writings existed, Chhagan was at Pirán-Pattan. His only son, Magan, had then been some time dead; his wife Gúlabbáí was past the average age of child-bearing with Hindú women. His brother Bechar had died in 1850; his nephews Mánchand and Ranchhod in 1852-53. The plaintiffs, his grandnephews, then mere children, were the sole surviving males (except himself) of the family of Govind As'árám. Under these circumstances it was natural that Chhagan should think of marrying a second wife, and it was natural that he should look for her at Pirán-Pattan, his native place, for that, according to the evidence in this case (according to what we should expect among Hindús), is the general course: these Pirán-Pattan men come down to Bombay to make money, but if not married when they come, or if they wish to be remarried, they go back to Pirán-Pattan to find a first or second wife as the case may be. Well, we find that Chhagan did attempt to find a second wife in Pattan. What other offers he made does not appear, but he certainly proposed for the daughter of that

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wily and astute old witness No. 8, Bechar Hirá, the same who spoke most confidently to its being a notorious fact in Pattan that Chhagan was separate in estate from his brother Bechar. Now, if Chhagan was really separate when he made this offer, he was, in point of worldly position, a very eligible son-in-law ; if he was not, then, in the event (which from his time of life was probable) of his dying before his young wife, he would leave her in the very unsatisfactory position of a widow kept on maintenance in an undivided family. Witness No. 8 was obliged to admit that he had refused his daughter to Chhagan, and as he had just before most positively asserted that he, in common with the whole caste at Pattan, knew Chhagan to be then separate in estate from Bechar, he saw at once that he must assign a plausible reason for this refusal. He therefore volunteered the following explanation :—" Shall I tell you the real reason why I would not give him (Chhagan) my daughter ? I woud not give him my daughter, because he killed a serpent that turned up in the gutter of a house he was going to build; I thought him a butcher." It was impossible not to be struck with the air of gratified ingenuity and complaisant virtue with which the crafty old witness delivered this answer. And, indeed, it was a very clever answer. In the north of Gúzerát the influence of the Jains and their doctrines is still strong—the greatest regard is shown to animal life. The serpent, besides, especially in its more venomous varieties, is not very common in Gúzerát, and it is held in a certain superstitious veneration. So that the answer was a very plausible one, and, although it might possibly be a pure invention, might also possibly be true. It might also quite as possibly, and far more probably, be the case, that this old Soni refused Chhagan his daughter because he was not satisfied of his having been really separated in estate from his brother Bechar. I must say that from the witness' manner I was led to regard his volunteered story of the serpent as a clever fiction invented on the spur of the moment, and so regarding it, I am further led to consider his refusal of his daughter to Chhagan as having really proceeded either from a knowledge that he

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was not separate in estate from Bechar, or at least from a grave doubt whether he was so. Chhagan, thus disappointed in finding a second wife at Pattan, comes down to Bombay and there proposes for Putlibái, the daughter of the Bombay Soni Zummakrám Náná. He is accepted, and executes to Zummakrám Náná, in April 1855, the document, which he confirms in 1856, the very confirmation, as it appears to me, tending to show that some suspicion had probably been excited in Zummakrám's mind as to Chhagan's really possessing the absolute disposing power which he had assumed to possess by the writing of April 1855.

Still if these documents, or either of them, had been attested by members of the Soni caste (even in Bombay), so that it might have become generally known in the caste that Chhagan Govind was dealing with his property as though separated in estate from his brother, I should have considered that the execution of these writings *did* afford some satisfactory kind of inferential proof that Chhagan was really, as he assumed to be, separated in estate. But was this so? No; except the one member of the caste, who was necessarily a party, for Chhagan could not, of course, marry out of his caste—except his new father-in-law, Zummakrám, no other member of the Soni caste is shown to have been made aware of the contents or of the execution of these writings. Not one of the attesting witnesses to either of these documents was a Soni; and, be it remembered, attesting witnesses to Hindú documents are something more (and less) than witnesses to the signature. They are supposed to know and give a sort of sanction to the contents of the documents, and it not unfrequently happens that they are not present when the signature is actually made. Neither of these documents was attested by a Soni. They were attested respectively by a Brahman whom Chhagan had met with at Wái and by two Banyás; one of these latter witnesses, witness No. 3, protested when asked to attest, on the ground that he was not of the caste. "Chhagan," he says, "came to me and said, I have got estates which I am going to make over to my wife, and he requested me to make my

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attestation." I said, "I don't belong to your caste; ask some of your caste people." Such being the circumstances attending the execution of these documents (exhibits Nos. 1 and 2), it seems to me that the inference endeavoured to be founded on their execution does not fairly arise therefrom; on the contrary, it would appear to me that the fairest inference would be, that Chhagan rather desired to keep as secret as he could from his caste the fact that he was dealing with his property as one who had been separated in estate from his brother.

The rest of the documentary evidence adduced has no important, if any, bearing on the point of the brothers being separated in estate. The exhibits Nos. 5 and 6, each bearing the same date of 29th April 1861, only show that a division of the rents and profits took place after Chhagan's death, between the widow, as representing Chhagan, and the plaintiffs, as representing Bechar, on the footing that each should share equally in the proceeds. But a division in equal shares of the proceeds may have been a mere matter of convenient or equitable arrangement, and is of little, if any, value as proving a separation in or division of estate.

Upon the document exhibit No. 8, I will only remark that, considering the circumstances under which it was obtained from the elder of the two plaintiffs, it ought never to have been put in or relied on by the defendants. I have no hesitation in saying that, in my opinion, it is clearly shown to be evidence of nothing except of a low and discreditable trick attempted to be practised on the young Chhabilá Mánchand—a trick sought to be carried out, I hope not also concocted and contrived, in the office of an attorney who, though not now practising in Bombay, is still on the rolls of the High Court.

On the whole, looking at all the evidence adduced before me in this lengthened inquiry, both oral and documentary, it fails to lead me to the conclusion, that any separation in estate ever took place between the two brothers Bechar Govind and Chhagan Govind. Upon the whole matter,

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therefore, I record a finding on all the issues raised in favour of the plaintiffs, in the negative of the first and fourth issues, and in the affirmative of the second and third issues.

The decree will be for the plaintiffs, declaring them entitled to the entirety of the dwelling-house and premises in the 4th paragraph of the plaint mentioned—subject to the respective rights of the three widows, Jethibái (defendant No. 6), Jadávbái (defendant No. 7), and Devkúvarbái (defendant No. 8). The decree will also direct that possession be forthwith given to the plaintiffs by the first defendant (the widow of Zummakrám Náná) for herself and the second and third defendants (the infant sons of the said Zummakrám Náná) of the premises, or such portion thereof as may now be in their possession or occupation.

This decree is for the plaintiffs, with costs as against the first defendant (for herself and as guardian of the second and third defendants), without costs as against the other defendants on the record, viz., the fourth, fifth, sixth, seventh, and eighth defendants.

Attorney for plaintiffs: *H. S. Carter.*
Attorney for defendants 1, 2, and 3: *C. Tyabji.*

In re ALLIANCE FINANCIAL CORPORATION.

BLANEY'S CASE.

Act XIX. of 1857——*Registration of Company*——*secondary evidence of certificate*——*evidence* aliunde—*Register of Shareholders—Contributory.*

The Register of Shareholders, required by Sec. 14 of Act XIX. of 1857, may consist of particulars entered in different books, which taken together substantially contain all the information which the Act requires.

If there be a substantial compliance with the requisitions of the Act, the Register is not invalidated by reason of slight deviations from its directions, or by unimportant omissions or defects in the particulars of information specified in Sec. 14.

If the Certificate of Registration be not forthcoming, the fact of incorporation may be proved *aliunde.*

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November 24.
December 4.
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THIS was an application by Thomas Blaney to have his name removed from the list of contributories of the Alliance Financial Corporation, as settled by the official liquidator.

The Advocate General (Hon'ble L. H. Bayley) and *Pigot,* for the applicant, contended that there had been no acceptance of shares by him; that the company was not registered; that the name of the applicant was not entered in a "Register of Shareholders,"—there being in fact no such Register within the meaning of the Act; and that he was not a subscriber to the Memorandum of Association.

Howard and *McCulloch,* for the official liquidator, argued that the applicant had virtually admitted by his acts that he had accepted the shares; that there was sufficient proof of the company having been incorporated; that there was what substantially constituted a "Register of Shareholders," in the books of the corporation produced before the Court, which contained all the information required by the Act; or, at all events, that the Court had the power to direct the drawing up of such a Register from the materials contained in those books; and that the name of the applicant had been entered in those books. He was, therefore, a shareholder and a contributory.

Cur. adv. vult.

1866. December 15. BLANEY'S CASE.

SARGENT, J.:—This case comes before the Court on an application by Mr. Thomas Blaney to have his name removed from the list of contributories of the Alliance Financial Corporation, as settled by the official liquidator.

The circumstances under which Mr. Blaney became possessed of the shares, which are now the subject of discussion, were as follows:—It appears, from what Mr. Blaney has stated, that an allotment of five shares was made to him, without any written or verbal application for shares on his part; that he subsequently paid the deposit upon those shares, and afterwards proceeded to the office of the solicitor for the purpose of signing (as he said) the documents which it was necessary for him to sign to make him a shareholder of the company; that he gave the people at the office to understand that he had come for that purpose; that he was directed to go into a certain room, where he would find the papers he wanted; that he went into that room and did find certain papers, which he signed. Those papers, he said, were blank sheets of paper, which were not annexed to any deed,—not annexed, as he said, to the Memorandum or Articles of Association.

Now these being the circumstances under which he has become possessed of these shares, and dealt with the company in respect of the shares, the question is whether he falls within Secs. 64 and 17 of Act XIX. of 1857, which taken together define a contributory. By Sec. 64 "Any existing or former shareholder upon whom calls are authorised to be made by the Third Part of this Act is hereinafter called a 'contributory;'" and with regard to the question, Who is a shareholder? Sec. 17 says: "Every person who has accepted any share in a Company registered under this Act, and whose name is entered in the Register of Shareholders, and no other person (except a subscriber to the Memorandum of Association in respect of the shares subscribed for by him), shall, for the purposes of this Act, be deemed to be a shareholder."

It has been contended for Mr. Blaney that, in the first place, there had been no acceptance of the shares; secondly,

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that the company has not been incorporated; thirdly, that there is no Register within the meaning of the Act; and fourthly, that he was not a subscriber to the Memorandum of Association.

As to the question whether there has been an acceptance of the shares, Mr. Blaney himself has virtually admitted in his evidence that he accepted the shares,—that is to say, he admitted having paid the deposit and done all that a man usually does when he takes shares; and only objected that something else was required to make him a shareholder and a contributory.

Next, in respect to whether or no the company was an incorporated company, of course the best and most conclusive evidence would be the production of the certificate of incorporation, which, according to Sec. 11 of the Act, "shall be conclusive evidence that all the requisitions of this Act in respect of registration have been complied with." That, of course, was the natural proof of incorporation, and the one which the Court would expect to have given it, unless satisfactory reason could be given for its non-production. In the present case, however, it appears that the certificate of registration is not forthcoming; and the first question that arises is, whether secondary evidence can be given of the certificate. The answer to this question must depend, of course, upon the evidence as to whether search has been made for the certificate in all places where it might reasonably be expected to be found. [With regard to this point his Lordship read the evidence of Mr. Crawford, the solicitor for the company, who said that he had taken the usual steps for registering the company, and that he had obtained a certificate of registration from the Registrar, and handed it over to the manager of the company, having first taken a copy of it; that the manager to whom the certificate was given, on the 25th of November 1864, was Mr. William Wilson, who was no longer in Bombay; and that he had not since seen the certificate, and had only become aware at the previous hearing of this matter that it could not be found. His Lordship also read the evidence of Mr. G. R. Wilson, the official liquidator, and of

Mr. Curnin, the manager for the liquidators, showing that a diligent and thorough search had been made, but that the document could not be found.] Under these circumstances the question is, whether secondary evidence of the contents of the certificate is admissible. I am of opinion that it is; and, therefore, admitting secondary evidence, the question is, whether any satisfactory evidence has been given as to the contents of that document. Coupling Mr. Crawford's evidence as to the copy which he said he had taken of the certificate, and which he produced in court, with the evidence of Mr. Taylor that he had given a certificate, the Court has conclusive evidence as to the fact that a certificate was given, and also as to the contents of that certificate. It has conclusive evidence as to a paper having been given which was stated to have been a certificate; and it has secondary evidence as to the contents of that certificate, from the copy which Mr. Crawford produced, and which showed that the original document had been a certificate of registration.

There is thus sufficient evidence that the company has been incorporated; but the case does not rest there. The certificate of registration, it is quite clear, is not the only evidence; for the fact of incorporation may be proved *aliunde*: *Agriculturist Cattle Insurance Co.* v. *Fitzgerald* (*a*).

Assuming such evidence to be admissible, what evidence is there? There is the evidence of Mr. Crawford, who says that he went to the Registrar's office on the 25th of October 1864, taking with him the Memorandum and Articles of Association, and that he obtained a certificate of registration from Mr. Taylor, the Registrar, to whom he paid the fees. His evidence, therefore, goes to prove that he had done all that was necessary for him to do; and the next question is how far has his evidence been corroborated by the evidence of Mr. Taylor and of the other witnesses who have been examined. [His Lordship here read from Mr. Taylor's evidence, which showed that Mr. Taylor had given a certificate of registration, and, moreover, that the company

(*a*) 16 Q. B. 432; 20 Law J., N. S., Q. B. 244.

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had been registered in a book called the Register of Certificates.] It is fair, however, to say, that from the evidence of Mr. Curnin, who is stated to have kept that book, it appears that the book had been copied,—as, indeed, Mr. Taylor himself admitted,—from another book; and the counsel for Mr. Blaney very properly required that that book should be produced. The book has been produced, and the original entry of the registration of this company has been found in it; but Mr. Curnin himself stated in evidence that that entry was made later in the year than the 25th of October 1864, which appears from the book to be the date of registration. It thus appears that the actual registration did not take place when Mr. Taylor gave the certificate of registration; and that would seem to have arisen from his having allowed the Memorandum and Articles of Association to be taken back by the solicitor of the company, under the promise that they would be returned as soon as possible. They appear from the evidence of Mr. Crawford to have been returned in about two months; and that was confirmed by another and somewhat hostile witness (Bápú Moroji), who had been a clerk under the Registrar, and who said he thought it had been one or two months after the 25th of October when he first saw the Memorandum and Articles of Association. It also tallies with what Mr. Curnin stated: for he said the actual entry had been made about the end of the year, and that it must have been made upon the production of the proper documents.

It appears, therefore, that the company had been registered before the end of the year 1864; but whether it could be said that it was actually registered when Mr. Taylor gave the certificate was another question. The evidence was quite conclusive that, before the end of the year, this company had been duly registered in a book kept for the purpose of the registration of companies; and, therefore, whether the matter be considered with reference to the certificate, or with reference to evidence *aliunde*, it appears that the company had been registered.

The next question for consideration is, whether the books

which have been produced as a Register can be viewed in that light, having regard to the provisions of the Act.

Now, these books purported, by the endorsements upon them, to be a stock-ledger, a register of transfers of shares, and a shareholders' address-book; and it was contended for Mr. Blaney that this was nothing more than a register of allottees. I shall consider, in the first place, whether these books contain, substantially, the information which the Act requires that every Register should contain. Sec. 14 of the Act is as follows:—"Every Company registered under this Act, hereinafter referred to as the Company, shall cause to be kept in one or more books a Register of Shareholders, and there shall be entered therein the following particulars:—(1) The names, addresses, and occupations, if any, of the shareholders in the Company, and the shares held by each of them, distinguishing each share by its number; (2) the amount paid on the shares of each shareholder; (3) the date at which the name of any person was entered in the Register as a shareholder; (4) the date at which any person ceased to be a shareholder in respect of any share." Now, in the books before the Court there are the names and addresses of the shareholders, but not the occupations. It is true that the actual numbers of the shares,—that is, each number separately,—are not set out; but it appears that the extreme numbers of the shares are given,—that is to say, the first and the last numbers are given, without those that were intermediate. It may reasonably be concluded that the numbers not given were those which were intermediate between the numbers given; and this was the effect of a decision in the House of Lords, in the case of *Bain* v. *Proprietors Whitehaven R. Co. (b)*, where —though the Act required that each share should be distinguished by its number—it was held that "No. 1551 to No. 1600," as including all the intermediate numbers, was sufficient. In the present case, the first and last numbers being given, there was a substantial compliance with the Act, which required that the number of each share should be inserted.

(*b*) 3 H. L. Ca. 1.

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Further, "the amount paid on the shares of each shareholder" appears in the books. With regard to the date as required by the Act, the month and the day of the month are given, but not the year. But, under the circumstances, it would be impossible to hold that books which purported to be a Register should not be regarded as such, on the ground that the year in which entries had been made was wanting. It might be that the want of the date would give rise to considerable difficulties, if the company were suing in respect of calls, or indeed, if the company had continued in operation for more than three years; but it would be impossible to hold that the Register was not a register, simply because the complete date was not there. No difficulty can arise in the present case as the order for winding up the present company was made in March 1866, and the books could refer to no other "April" than April 1865. It is well established that slight deviations from the requisitions of the Act do not invalidate the Register so as to prevent the Court from regarding it as a Register this is perfectly clear from the leading case on the subject *The Southampton Dock Co.* v. *Richards*, decided by *Tindal* C.J. (*c*), which was followed in the subsequent case of the *Wolverhampton New Waterworks Co.* v. *Hawkesford* (*d*). In the latter case the Act required that the Register should be sealed, but the Court held that the absence of the seal did not invalidate the Register. And there are many other similar cases, all showing that if the information required is substantially given, unimportant omissions and defects do not invalidate the Register.

Under these circumstances I am of opinion that the books before the Court do substantially constitute a Register and that it is a Register of Shareholders (and not of allottees) is quite clear from the very fact that a register of transfers had been kept, which was only possible after actual incorporation, and after allottees assumed the more definite character of shareholders; and that the endorsement upon one of the books was "shareholders' addresses." Again, it was plain that the books referred to one another, from the fact tha

(*c*) 1 Man. & G. 448. (*d*) 29 Law J., N. S., C. P., 121.

the same names were found in each of them; and, therefore, taking the three books together, it is clear to me that these books do substantially constitute a Register within the meaning of the 14th section of the Act.

I consequently find that there has been an acceptance of the shares, and that Mr. Blaney's name has been entered in books which are equivalent to a Register of Shareholders; and such being the case, it is unnecessary to consider the further question,—whether there had been a subscription of the Memorandum of Association,—the name having been entered in the Register. The result, therefore, is that Mr. Blaney's name must stand on the list of contributories.

Application refused.

In re EAST INDIAN TRADING AND BANKING COMPANY.

JAMNA'DA'S SAVAKLA'L'S CASE.

Purchase of Company's shares by individual Directors and Managers —Absence of sanction by Board—Omission of formalities enjoined by the Legislature and by Articles of Association—Lâches of original allottee—Indian Companies' Acts of 1857 *and* 1866—*Contributory.*

J. S., an allottee of 25 shares in a company registered under Act XIX. of 1857, signed the Memorandum and Articles of Association, and paid the first call on the 28th of September 1863, on which day he sold the 25 shares to B. P., the Chairman of the company. The purchase by P. B. was made in pursuance of an agreement entered into between B. P. and P. H., another Director of the company, and two other persons, who were members of the firm of B., B., and Co., the then Managers of the company, to buy in partnership 2,800 shares of the company, which they accordingly jointly purchased and subsequently divided among themselves; B. P. taking for himself two-fifths of the whole, including the 25 shares of J. S.

The fact of the joint purchase was not communicated to the other Directors of the company; nor was there any evidence to show that their attention had been called to certain entries in the books of the company relating to B. P. having paid the second call on his two-fifths of the joint purchase.

J. S. got no notice to pay the second call, and never applied for or obtained a certificate for the 25 shares; but such a certificate was obtained by B. P., on the 10th of October 1864, certifying that J. S. was the shareholder. J. S. had signed a blank form of transfer, and a blank form of request to the Directors to transfer, which were undated and without

particulars; but B. P. never executed the transfer as transferee, and the shares never were transferred to his name on the register, nor was the sale to him ever brought to the notice of the Directors as a Board, or any request made to them to sanction the transfer to him, or to any of his partners, of any portion of the 2,800 shares; and the Articles of Association required the consent in writing of the Directors to every transfer.

On application by J. S. that his name should be removed from the list of contributories, as framed by the Official Liquidator, and the names of B. P.'s trustees, under Act XXVIII. of 1865, substituted therein in respect of the 25 shares :—

Held that J. S. was not exonerated, under the circumstances, from the duty of obeying the Articles of Association and the provisions of Act XIX. of 1857; that the act of an individual Director in his private capacity ought not to bind the Board, which had never authorised or ratified his conduct; and that the Official Liquidator, as representing the body of shareholders, rightly insisted upon keeping J. S.'s name on the list of shareholders.

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A SUMMONS had been obtained, on the 23rd of February 1867, by *Mr. Keir*, on behalf of the official liquidator, Mr. P. E. Bendir: calling upon certain shareholders to show cause why calls, made originally by the company, and which remained unpaid, should not be paid by them.

Mr. Rimington (Messrs. Kelly and Co.) attended before the sitting Judge in chambers, on the 7th of March, for J. S. and two other persons on the list of contributories; and applied that the name of J. S. should be removed from the list, and that the names of the trustees, under Act XXVIII. of 1865, of B. P., should be substituted.

Mr. Peile (Messrs. Cleveland and Peile), on behalf of B. P.'s rustees, opposed Mr. Rimington's application, and obtained n adjournment till the 18th of March, on which day, and n the 28th of March, evidence was gone into at consider- ble length.

Howard, for the official liquidator, supported the original ummons of the 23rd February, and opposed Mr. Riming- on's application.

WESTROPP, J.:—The facts of the case are as follows:—

Jamnádás Savaklál, the applicant, was an original allot- ee of 25 shares in this company. He signed the Memorandum and Articles of Association, and paid the first all of twenty-five rupees per share on the 28th of Septem-

ber 1863. He, on the same day, instructed a broker, Tulsidás Kisandás, to sell the 25 shares. They were sold on that day, as Jamnádás believed, to Bhagvandás Parshotamdás, and on the same day, or within three or four days afterwards, were paid for.

The directors of the company at the time of that sale were Bhagvandás Parshotamdás (chairman and apparently the chief promoter of the company), Pránjivandás Hargovandás, Balvantráv Bhikáji, and Harichand Harishankar. They are named in the 24th Article of Association.

The managers of the company, acting under the Board of Directors, were, under the 25th Article of Association, the firm of Bhikú, Bábáji, & Co., the partners in which were eight in number,—namely, Bhikú Sázbá, Bábáji Káshináth, Náráyaṇ Sázbá, Bálkrishṇá Sázbá, Krishṇáráv Pándurang, Ganpatráv Pándurang, Dhákji Káshináth, and A'nandráv Pándurang. That firm filled the office of managers from the institution of the company, in September 1863, until June 1864, when they resigned, and two of the partners, viz., Bhikú Sázbá and Bábáji Káshináth, were appointed directors. One Chintobá Bháskar was then appointed manager.

Upon, or immediately after, the starting of the company, Bhagvandás Parshotamdás, Pránjívandás Hargovandás (then being directors), Bhikú Sázbá and Bábáji Káshináth, or their firm of Bhikú, Bábáji, and Company (then being managers of the company), agreed to buy 2,800 shares (scrip) of the company in partnership, expecting that the transaction would be profitable, and would have the effect of raising the value of the shares in the market. They did so, and amongst the shares so purchased were the 25 shares of Jamnádás Savaklál. The 2,800 shares were subsequently divided into five parts, two of which, including the 25 shares of Jamnádás, were taken by Bhagvandás Parshotamdás, and the remaining three parts were given respectively to the three other partners in the originally joint purchase of 2,800 shares.

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To that joint purchase the directors Balvantráv Bhikáji and Harichand Harishankar were not parties. Their co-directors, who were implicated in it, admit that they were anxious to conceal it from them, and carefully refrained from communicating it to them, and state that they believe that neither Balvantráv Bhikáji nor Harichand Harishankar knew anything about the purchase of the 2,800 shares in general, or the 25 shares of Jamnádás Savaklál in particular. There certainly is not any direct evidence that they did know of either of these purchases. It has, however, been contended with much ability by Mr. Rimington that they must have known of these purchases, and must be taken to have sanctioned them.

It is said that it was apparent in the books and documents of the company that Bhagvandás Parshotamdás had purchased 1,360 shares, including the 25 shares in question, and had paid to the company, and the company had received from him, as such purchaser, the second call of Rs. 25 per share upon the 1,360 shares, and that all of the directors must be taken to be aware of the contents of the company's books, and that the company is now estopped from treating Jamnádás Savaklál as a shareholder, and Bhagvandás Parshotamdás is estopped from denying that he is the holder of the 25 shares.

That Bhagvandás did pay the second call upon the 1,360 shares is undeniable. He himself admits it. He, as an original allottee, held in his own name 100 shares only. But 100 shares were also allotted to his wife, and 100 shares to his cousin Pránjívandás Tulsídás. Upon all 300 Bhagvandás has paid the first and second calls.

On the credit side of the company's cash-book, which shows expenditure, there appears at page 94, under date the 8th of February 1864, in connexion with the name of Bhagvandás Parshotamdás, the following item :—"Cash paid for his shares, being 2nd call, Rs. 41,762-13-4." It contains a reference, in red ink, to voucher No. 21. On the debit side

and opposite page 93 of the same cash-book, there appear the following items, under date the 8th of February 1864 :—

To STOCK ACCOUNT.

Cash received from 3 shareholders, v. No. 18, being second call	Rs.	750	0	0
Cash received from 4 shareholders, v. No. 19, being second call	„	41,500	0	0
	Rs.	42,250	0	0

To INTEREST ACCOUNT.

Cash received from shareholders, v. 20	Rs.	4	12	0
Ditto ditto v. 21	„	262	13	4
	Rs.	267	9	4

The first and third of these items on the debit side have no bearing on the present question, but the second and fourth items (Rs. 41,500 and Rs. 262-13-4) on the debit side amount in the aggregate to the item Rs. 41,762-13-4, which I have mentioned as appearing on the credit side.

Voucher No. 21, which is a debit slip and referred to in red ink on both sides of the cash-book, shows that on the 8th of February 1864 Bhagvandás was debited with Rs. 41,762-13-4, in the following manner :—

" Debit to Bhagvandás Parshotamdás the amount paid to his account on the following shares as 2nd call—

Mr. Bhagvandás Parshotamdás—shares 100	Rs.	2,500	0	0
do., interest	„	15	13	4
Mrs. do. do. do.	„	2,500	0	0
do., interest	„	15	13	4
Pránjivandás Jagmohandás—shares 100	„	2,500	0	0
Do. do., interest	„	15	13	4
	Rs.	7,547	8	0
Mr. Bhagvandás Parshotamdás for shares 1,360 purchased by him	„	34,000	0	0
Do. do. interest	„	215	5	4
	Rs.	41,762	13	4

The cash-book was usually produced to the directors at their weekly meetings. So far, however, as the evidence goes, it would show that the attention of Balvantráv Bhikáji and Harichand Harishankar (the two directors who were independent of the partnership dealing in the shares of the

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company) was not directed to the entries to which I have referred. It does not appear to have been the practice to submit vouchers, such as the debit slip No. 21, to the Board of Directors, unless specially called for, nor does that voucher appear to have been laid before them. Even if it had been produced, it would not have shown what the 1,360 shares were, or that the 25 shares originally allotted to Jamnádás Savaklál were among them. No document or entry *then in existence*, and in the possession of the company or its managers, has been produced before me, which would have marked the 25 shares in question as amongst the 1,360 shares on which Bhagvandás Parshotamdás paid the second call.

Mr. Rimington has indeed shown it, by reference to certain entries in a book called the share transfer register, and by an ingenious argument, founded upon those entries, as to the amounts paid in respect of the second call on the 8th of February 1864 upon certain shares, including the 25 shares of Jamnádás Savaklál; but he arrived at that result only after laborious ratiocination—a process which, even if the directors had before them the entries in that book, it is not probable that they would have resorted to.

The identification of the 25 shares as part of the 1,360 is more latent in, than patent upon, those entries. But the evidence of Bábáji Káshináth, adduced on behalf of Jamnádás Savaklál, proved that those entries are in the handwriting of Rámchandra Visrám, who was not in the employment of the company until after June 1864, when Chintobá Bháskar had become manager.

Those entries then, not having been made until many months after the payment of the second call on the 8th of February 1864, could not have been laid before the directors at any weekly meeting which occurred soon after that payment, and at which it is at all probable that their attention would have been directed, if it were so at all, to the entries at pages 93 and 94 of the cash-book to which I have already adverted.

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The sale in September 1863 of the 25 shares was effected through brokers—Tulsídás on behalf of Jamnádás Savaklál, and Tríkam on behalf of the purchasing partnership, at the head of which was Bhagvandás. No interview seems to have taken place between Jamnádás and Bhagvandás or any other partner in the purchase. In November, Jamnádás signed a blank form of transfer and a blank form of request to the directors to transfer. These forms were undated, did not state how many shares had been sold, or the particular number of any one of the shares, or the name of the intended transferee, and continued in that state when produced before myself on the demand of Mr. Rimington, but by the trustees of Bhagvandás Parshotamdás, and not by the company or its liquidator. Subsequently to the signing of the blank transfer, an impress stamp appears to have been placed upon it at the desire of Bhagvandás. He never signed any of the forms. The blank forms signed by Jamnádás were given by him to a servant or broker of Bhagvandás; and Jamnádás in his oral evidence admitted that, after doing that, he "took no further steps with respect to the shares," and took chance for the transfer being completed.

He received no notice to pay the second call, or to pay the third call, except the notice to pay the official liquidator, and never applied for or obtained a certificate for the 25 shares.

Bhagvandás, however, did obtain such a certificate, No. 949, dated the 10th of October 1864, but it certified Jamnádás Savaklál to be the shareholder. It was for 25 shares, numbered 6,271 to 6,295, and was signed by Harichand Harishankar and Bhikú Sázbá as directors, and countersigned by Chintobá Bháskar as manager. Upon it was indorsed the payment of the second call, but there was no statement as to the person by whom it was paid. That certificate was produced by the trustees of Bhagvandás Parshotamdás.

The 25 shares do not appear to have been ever transferred in the register to the name of Bhagvandás. They stand in the book already described as the share transfer register in the name of Jamnádás Savaklál, and to him the first and second calls are there credited.

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There is not any evidence to show that the sale by Jamnádás was ever brought to the notice of the directors as a Board, or that they ever, as a Board, were requested to sanction the transfer to Bhagvandás or any of his partners. The transfer deed and the request to transfer appear never to have been laid before the Board, or to have left the possession of Bhagvandás, until he made them over to his trustees. He never executed the transfer as transferee. Bhagvandás must, and his co-director Pránjívandás may, have known of the purchase of 25 shares. He certainly knew that 2,800 shares had been purchased, but he denies—and I am not by any means prepared to say that he does so untruly,—that he knew that the 25 shares of Jamnádás were amongst them. There is not, however, any evidence that either Harichand Harishankar or Balvantráv Bhikáji ever heard of or sanctioned either purchase.

The managers no doubt knew that Bhagvandás held scrip for 1,360 shares, part of the 2,800, but they alone, and without the knowledge and authority of the Board, could not sanction the sale, or by such entries as have been produced render Bhagvandás the transferee.

The 4th Article of Association is :—"No shareholder shall transfer his share without the consent of the directors expressed in writing." The 5th is:—"The company shall not be obliged to register the transfer under the regulations Nos. 13 and 14 of the said Table B (to Act XIX. of 1857), unless he is approved by the directors;" and the 6th :—"If any shareholder feels aggrieved by the refusal of the directors to allow him to transfer his share, the matter shall be settled by a general meeting of the company."

Those articles establish this—that with the directors only did the power of sanctioning transfers in the first instance rest, and that in the event of their refusal an appeal lay to a general meeting of the shareholders.

And further, the law in force as to the transfer of shares at the time of the sale of his 25 shares by Jamnádás Savaklál, and down to the 1st of May 1866, was the 18th section of

Act XIX. of 1857, which prescribes the form of transfer, and directs "that it shall be executed both by the transferor and transferee," and that the transferor shall be deemed to remain a holder of such shares until the name of the transferee is entered in the register book in respect thereof." Sec. 193 of Act X. of 1866 (the Indian Companies' Act), which enacts that "any company registered under Acts XIX. of 1857 or VII. of 1860, or either of them, may cause its shares to be transferred in manner hitherto in use, or in such other manner as the company may direct," did not come into force until the 1st of May 1866, and can apply only to transfers made since that time.

The Sheffield &c. Railway Company v. Woodcock (*a*), and *The Cheltenham &c. Railway Company* v. *Daniel* (*b*), were cited for the applicant, to show that Bhagvandás could not dispute the validity of the transfer, although the rules relating to transfer had not been formally complied with. However, both of these cases were actions for calls against transferees placed on the register of their own accord, and who were by their own conduct estopped from denying that they were shareholders.

In *Bargate v. Shortridge* (*c*) the transferee had been placed on the register, and transfers of the shares of the company had been for many years registered without the observance of the formalities required by the company's Deed. It is no doubt true that, although the prescribed formalities in making a transfer may not have been rigorously complied with, yet both the company and the transferee may by their acts have estopped themselves from denying that the transferee is a shareholder in the company. This has been held in many cases besides those already mentioned; for example, *Straffon's Executors' case* (*d*), *Sanderson's case* (*e*), *Maguire's case* (*f*), *Mayhew's case* (*g*), *Watson* v. *Eales* (*h*), *Gordon's case* (*i*).

(*a*) 7. M. & W. 574. (*b*) 2 Q. B. 281. (*c*) 5 H. L. Ca. 297.
(*d*) 1 D. M. & G. 576. (*e*) 3 D. & Sm. 66; 3 H. L. Ca. 698.
(*f*) 3 D. & Sm. 31. (*g*) 5 D. M. & G. 837. (*h*) 3 Jur. N. S. 53.
(*i*) 3 D. & Sm. 249.

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In all of the cases in which this doctrine has prevailed, it will, however, be found that the act treated as the act of the company was the act of the directors as a body, or of some official of the company duly authorised to perform it, and in most, if not all, of those cases the name of the transferee had been placed on the register. The case of *Meux's Executors* (*j*) is another instance in which the act of the directors was held to bind a company. But that act was a misrepresentation made by them as a body through their secretary. It cannot be pretended that there was any misrepresentation in the present case. The mere omission to send notice of the second call is not misrepresentation.

In *Walker's case*, one of those which has arisen in winding up Overend, Gurney, & Co. (*k*), the transfer was executed by the transferor only, and the court held that it could not dispense with the directions contained in the articles, and that, the transfer not having been, in pursuance of them, registered or submitted to the directors for their approval, the transferor's name must remain on the list of shareholders. The decision of Lord Romilly, M.R., in *Shepherd's case* (*l*), is to the same effect. That ruling was appealed against, but was upheld by the Lords Justices Turner and Cairns (*m*), who said that the remedy of the transferor, if any, was against the transferee, and not against the company, who were entitled to retain the name of the transferor upon the list.

In *Head's case* (*n*), where the registered owner of shares executed a transfer of them to a purchaser two years before the date of the winding-up order, but took no steps to procure the transfer to be registered, Lord Romilly refused to remove his name from the list of contributories, although the transferee was the solicitor of the company, against whom alone Lord Romilly said the transferor could seek indemnity.

(*j*) 2 D. M. & G. 522.
(*k*) Law Rep. 2 Eq. 554.
(*l*) Law Rep. 2 Eq. 564.
(*m*) Law Rep. 3 Eq. 16.
(*n*) Law Rep. 3 Eq. 84.
(*o*) Law Rep. 3 Eq. 86.

In *White's case* (*o*), the facts showed a similar negligence on the part of the transferor to apply to the Company for the registration of the transfer. A like decision was made. Lord Romilly there very fully discusses the equities between the transferor and transferee, and those between the transferor and the company. He says :—"Though the court may see its way as between A and B to decree specific performance of a transfer of shares, yet it may say, as regards the shareholders themselves, it would be inequitable and improper to make that alteration in the list of the shareholders."

Jamnádás Savaklál, has, it is true, signed blank forms of transfer and request to the directors to make the transfer, but has allowed three years to elapse without taking any steps to have those documents laid before the Board of Directors. The fact that he sold his scrip to one or two of the directors did not exonerate him from the duty of obeying the Articles and Act XIX. of 1857. Admitting that directors may by their conduct preclude themselves from raising objections to the completeness of a transfer founded on the omission of formalities enjoined by the Legislature, or by the Articles or Deed of Association, yet the act of an individual director acting in his private capacity cannot and ought not to bind the Board unless it authorised or ratified his conduct. If the execution by the transferor of the transfer had been brought officially to the notice of a Board consisting of directors who were cognisant of and parties to the scheme of purchasing the 2,800 shares, and that Board, although it may have neglected to place the transferee on the register, nevertheless recognised his purchase, and received from him payment of calls upon the purchased shares, it might, albeit that the independent directors were absent from the Board on the occasion of such a recognition or of such a receipt of calls, be a question of some difficulty whether the company was bound by the acts of that Board to recognise the transferee as the shareholder. It is unnecessary for me to determine or express any opinion upon that question. It does not arise here. The fact of the sale by Jamnádás Savaklál

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of his 25 shares was not brought before the Board. The Board was entitled to exercise a discretion by sanctioning or placing its veto upon the transfer. That opportunity was never afforded to it. Jamnádás Savaklál was content to send forth his transfer paper into the share market in such a condition that it was impossible from it to ascertain whether he had sold one, two, or the whole twenty-five of the shares allotted to him, or the name of the person to whom he had sold them. He left it in the power of the vendee to insert his own name or any other person's name in the transfer, or to resell the scrip without inserting any name in the transfer, and to leave it in the power of the subsequent purchasers to do the same, and thus to deprive the revenue of the duty payable upon fresh transfers, and to evade all responsibility as registered shareholders. Up to the 1st of May 1866 Jamnádás Savaklál might have applied to the court, if necessary, for an order, under Sec. 23 of Act XIX. of 1857, that the register should be rectified, or after the 1st of May 1866, and down to the 19th of August in that year, when the absolute order to wind up was made, for a similar order for rectification of the register under Sec. 34 of the Indian Companies' Act of 1866. Adopting, with the unimportant variation of a single date, the language of Lord Romilly in *White's* case, I may say:—"Here the transfer takes place in September 1863, and the winding-up order is not made until 1866, and there is no quarrel. There is nothing to stop the registration of the transfer; why does not the vendor compel the purchaser to register the shares? He could have done so; but he has taken no steps for that purpose; and assuming"—a point upon which I refrain from expressing any opinion—"that the purchaser is bound to make good to him the price of the shares, and to indemnify him from all consequences, that is relief to be sought in a suit between those two persons. But in the case before me, I have to regard the rights and condition of the shareholders themselves. How are the shareholders of the company affected? They say,—You were bound to let us know what was the state of the company at the earliest period, and as you have not thought fit to do so, but have held

your peace for a period of three years, and done nothing whatever, you cannot complain now; and we insist upon having you on the list of shareholders, you not having taken any step to enforce your right to get the transfer made."

The application made for the removal of the name of Jamnádás Savaklál from the list of contributories must be refused. He must pay such past call, if any, as may still remain due upon his shares, and the costs of the official liquidator in this contest.

I am not called upon to offer, and I, therefore, do not offer, any opinion upon the claim of Jamnádás to indemnification against Bhagvandás Parshotamdás or his co-purchasers, or against his or their estates. In that matter Jamnádás may proceed as he may be advised.

The trustees of Bhagvandás Parshotamdás must bear their own costs of resisting the present application.

In re MERCANTILE CREDIT AND FINANCIAL ASSOCIATION, AND THE INDIAN COMPANIES' ACT, 1866.

Ex parte M. R. DALVI and others.

Purchase by company of its own shares—Neglect to register transfer—Estoppel—Allottees—Contributories—Act XIX. of 1857—Articles of Association.

A company registered under Act XIX. of 1857, and enabled by its Memorandum of Association to purchase its own shares, purchased seven hundred of them which were in scrip, share certificates having never been issued in respect of them. The letters of allotment indorsed by the allottees, and receipts for the first call, were made over, at the time of purchase, to the company. No transfers, however, were executed by the allottees, nor were the shares registered by the company in their own name; but they continued to stand in the names of the allottees. Two thousand of the seven thousand shares had been resold by the company, and the remaining five thousand were mentioned in a list, kept by the company, of shares purchased by them.

On application by the allottees to have their names removed from the list of contributories, as framed by the official liquidator :—

Held, that the company, through its directors, having, as well by the act of purchase as by their subsequent conduct, treated themselves as the owners of the shares, could not be permitted to take advantage of their own neglect, or that of their officers, in not registering the shares in the name of the company, and that the name of the company should, therefore, be substituted as holders of the shares.

1867. June 17, 22. *Ex parte* DALVI and others.

THIS was an application on behalf of several persons, whose names stood in Part II. of the list of contributories of the Mercantile Credit and Financial Association, as framed by the official liquidator, to be removed from it.

Dunbar for Mádhavráv Náráyaṇ Dalvi and many other persons.

Macpherson for Balvantráv Bhikáji Daule and two other persons.

The Advocate General (*Honourable L. H. Bayley*) for the official liquidator.

Cur. adv. vult.

July 2. WESTROPP, J :—This company was registered, under Act XIX. of 1857 and Act VII. of 1860, on the 29th of November 1864. The question, as to the right of the parties whose names stand in Part II. of the list of contributories to be removed from it, has been twice argued before me, and stood over for consideration.

That part of the list contains the names of the original allottees of seven thousand shares, by whom those shares have been, at some time or times previously to the 17th of January 1865, sold in scrip to the company. The allottees executed no transfers to the company, and the shares still stand in the names of the allottees, and have never been regularly registered by the company in its own name. The letters of allotment indorsed by the allottees, and the receipts for the first call, were, at the time of the sale of the shares, made over to the company, no share certificates having been issued to any of those allottees.

The company subsequently sold two thousand of those

1867. July 2. *Ex parte* DALVI and others.

shares in scrip to the Oriental Financial Association, and made over the letters of allotment of those two thousand shares, and the receipts for the first calls upon them, to the latter association, and on the same day contracted to repurchase them, and to take delivery thereof on a future day. Before that day arrived, a second call was made and became payable. Notice of that second call, and that if it were not paid, the two thousand shares would be declared to be forfeited, was sent by the company, not, as ought to have been done, to their own vendees, the Oriental Financial Association, but to the original allottees of those two thousand shares—a proceeding apparently intended to enable the company to declare a forfeiture of those shares, which had then considerably fallen in market value, and so to provide for their escape from the necessity of performing their contract to repurchase the same two thousand shares from the Oriental Association, at a higher price than that at which the company had sold them to that association. The Association not having paid the second call, the company declared the two thousand shares to be forfeited. Of the discreditable nature of that transaction I have already, on a former day, sufficiently spoken. In a civil suit instituted by the Oriental Financial Association against this company, for the purpose of compelling this company to take delivery of the two thousand shares, and begun long before the winding up of the company commenced, the Chief Justice, notwithstanding the attempted forfeiture, held the company bound by its contract to repurchase the two thousand shares from the Oriental Association (*a*). The company appealed against that decision, but finding, during the progress of the argument, that the court of appeal seemed strongly disposed, to uphold it, abandoned the appeal, admitted their liability and compromised the claim.

The third clause of the Memorandum of Association enabled the company to purchase its own shares, so that it was impossible to raise the objection that it was *ultra vires* on the part of the company to make such a purchase. On the first

(*a*) *Antè*, *p.* 1.

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day of the revision of this Part II. of the list of contributories, an opinion, to which I still adhere, was expressed by myself, that the official liquidator, representing, as he does here, the company, was estopped under the above circumstances from maintaining that the two thousand shares still belonged to the original allottees, and that this case falls within the principle on which Mr. Maclean's case had been decided. The shares were allotted in November 1864, on the 24th of which month Mr. Maclean, through a broker, sold his fifty shares to the company, executed no transfer paper, but ndorsed the letter of allotment, and made it, together with he receipt for the first call on those fifty shares, over to he company, who resold them, on the 26th of the same month, n the bazaar, and made over the letter of allotment and eceipt to the purchaser, but failed to remove Mr. Maclean's ame from the list, and to substitute for it either that of the ompany or that of the new purchaser. The purchase of Mr. Maclean's shares by the company appeared in the company's ooks, although not on the register. Under these circumtances I thought that Mr. Maclean could not have successfully ued the company for a share certificate, and demanded to be reated as a shareholder, and that he would be estopped from loing so by the sale of his scrip to the company; and that, on he other hand, the company would be estopped from conending that shares still belonged to him, which they had urchased from him, might have registered immediately on uch purchase in their own name, and neglected to do so, but lid actually resell to a stranger, and so completely disabled hemselves from restoring to Mr. Maclean. It seemed to ne against all principles of equity to permit the company, now vhen it has become involved in difficulties, to obliterate the istory of its own conduct, and to treat Mr. Maclean as still he holder of the shares, or rather scrip, which the company ad bought, sold, and again set afloat in the share market. Accordingly, Mr. Maclean's name was removed from Part I. of the list of contributories.

On the second day of the revision of Part II. of the list, he learned *Advocate General*, for the official liquidator, de-

clined to press any further his claim on behalf of the company to retain the names of the original allottees of the two thousand shares on the list. Therefore, and for the reasons which I have already given as to these shares, as also for many of those which I am now about to give with regard to the five thousand shares, the names of those gentlemen, so far as they represent, on Part II. of the list, any of the two thousand shares, must be removed from it. The learned *Advocate General* still contended that the original allottees of the remaining five thousand shares must remain on Part II. of the list. He relied to some extent on the fact that the company had not resold the scrip, but still retained it in its possession, and he laid much stress upon the 16th Article of Association :—"That every person who shall from time to time be or appear registered in the register of shareholders as the proprietor of any shares shall, unless and until his share, by operation of law or otherwise, shall become vested in some other person, be treated and recognised by the company as the lawful and rightful proprietor of such share, although in fact he may have been improperly so registered, and no other person claiming or entitled to be the proprietor of such share shall have any claim against the company in respect thereof, but only against the person who shall be so registered and his representatives."

It strikes me that the language of that article is scarcely applicable to the case of a purchase by the company itself, and is conversant rather with purchases by third parties from shareholders. It was evidently intended to protect the company from the claims of third parties who may have purchased shares, but have not come in and completed their title by procuring registration of the transfer in the company's books. The 1st Article of Association excludes the application of Table B annexed to Act XIX. of 1857. The 17th, 18th, and 19th Articles of Association are :—

"17. Any shareholder may sell and transfer all or any of his shares to *any person approved by the Board of Directors.*"

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"18. The instrument of transfer shall be signed by the transferor and transferee, and shall be in the form set forth in Schedule B hereunto written, or to the like effect, and the transferor shall be deemed the holder of such shares until the transferee is entered in the register of shareholders in respect thereof. Before registering any transfer, the company shall be entitled to receive, from the person applying for such registration to be made, a fee of four annas per share.

"19. The Board may decline to register any transfer of shares made by a shareholder who is indebted to the company."

Those three articles, like Article 16, savour rather of transfers by shareholders to third parties than of transfers to the company. But there remain the 17th and 18th sections of the repealed Act XIX. of 1857, relating to and insisting upon registration of transfers, which, it may be said, were law at the time of the purchase by the company of the five thousand shares. There are, however, many cases which show that although the formalities prescribed by a statute or by the Articles of Association have not been strictly complied with, yet the company and the purchaser may by their acts have estopped themselves from denying that the transferee is a shareholder. Several of those cases are collected in Mr. Thring's work on Joint Stock Companies, published in 1861 (page 51). I would more especially refer to *Watson* v. *Eales* (*b*) and *Gordon's case* (*c*). [Here His Lordship adverted at some length to those cases.] In all of those cases, however, there was a transfer, though an imperfect one, and registration of the transfer. In the two latter cases, indeed, the registration was more or less open to impeachment. The transferees in all were third parties, not the company itself as here. Hence those cases do not decide the present case. I merely quote them as instances in which public companies have been precluded by their conduct from insisting on formalities of transfer prescribed by the Legislature, or by their Articles or Deed.

(*b*) 3 Jur. N. S. 53. (*c*) 3 D. & Sm. 249.

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A leading case developing the same principle is *Bargate and Shortridge* (*d*). Shortridge had been a shareholder, but had sold his shares to another person, and the transfer thereof to him was registered in the company's register. By one of the rules of the company, no person was to be registered as a shareholder without the consent of a board of directors; and in that case no such consent had been obtained; and some time after the transfer had been registered, the directors declared the transfer void, put Shortridge again on the list, and returned him as a shareholder. They did this for the express purpose of enabling a creditor to proceed against him. It appeared that transfers had been for years registered like the one in question, without the observance of the formalities required by the company's Deed. The House of Lords affirmed the decree of the Master of the Rolls, declaring that Shortridge was no longer a shareholder; and granted an injunction to stay the creditor, who, it was established, was proceeding against him at the instigation of the company. The House of Lords based their affirmance of the decree upon the ground that the company could not take advantage of the non-observance by its own officer of formalities required by its own Deed. The imperfect transfer in that case was to a third party, but the reason given by the House of Lords seems still more applicable to such a case as the present, in which the company themselves were the purchasers of the s hares.

I must, however, admit that I have been unable to find any precedent which goes the full length to which it is necessary that the Court must go in the present case to exonerate the original allottees. The nearest case to it is *Taylor and Hughes*, decided in the Court of Chancery in Ireland by Lord St. Leonards in 1844 (*e*). It in some respects resembled *Bargate and Shortridge*. The plaintiff was originally the cashier of the company (the Agricultural and Commercial Bank of Ireland), and afterwards became a director. [His Lordship here stated the facts of the case:] As to three thousand shares of the bank allotted to the plaintiff, Lord St.

(*d*) 5 H. L. Ca. 297. (*e*) 2 Jo. & L. 24.]

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Leonards says: "The only difference between these cases (cases of other directors of the bank to whom shares had been allotted, which they retransferred to the bank, and received back bills of exchange which they had given to the bank for them) and the present, is that the plaintiff sold twelve hundred of the three thousand, and did not retransfer the rest. But he regularly paid to the bank £1,260, the price agreed upon for the shares which he sold, and although no actual retransfer of the remaining shares was executed, yet his bill for the £3,150 was returned to him, and is regularly entered in the books as for the repurchase from him of the three thousand shares; and the account was regularly closed. I think it clear that this transaction cannot now be opened, but is binding in equity, notwithstanding the provisions of the Act of Parliament (6 Geo. IV., C. 42, Sec. 22) and of the deed of settlement." I should mention that Taylor's name in respect of these shares had by the directors been removed from the register, but had, before the commencement of the suit, been restored again to the register by the winding-up committee. With respect to other shares purchased from Taylor by the bank, besides objections to the power of the bank to purchase them, it was argued that some of the assignments were not valid. As to that objection Lord St. Leonards said:—"I think that cannot prevail, for transfer was in effect to the company, and they thought fit in some instances to dispense with the machinery which the Legislature rendered necessary in such a case. This they were at liberty to do, even at law, according to the *Cheltenham Railway case*; and they cannot now, as between themselves and the partners with whom they contracted, impeach the transaction." It was next objected that the assignments, if valid, were not registered, and Lord St. Leonards thus disposed of that point:—"The fourth objection is of the same nature: but an assignment may be valid, and a member's name duly registered in lieu of the seller's, although, by the 9th Sec. of Stat. 1 Wm. IV., the transfer is not registered until a later period. The duty, moreover, of making a return of transfers seems under the Act to devolve on the company, and, if so, they cannot take advantage of their own neglect.

The evidence proves that transfers were constantly accepted by the company, and that some were defective from want of attention on the part of their officers."

The case of *Stray* v. *Russell* (*f*) shows that even in ordinary cases between transferor and transferee, the duty of procuring registration of transfer lies rather upon the transferee than the transferor. It was, moreover, the duty of the company to keep its register properly. Secs. 14 and 16 of Act XIX. of 1857, and Sec. 24 of the Indian Companies' Act of 1866, are express upon that point. Having become, in equity at least, the owners of the scrip for five thousand shares, I think that, although no transfers had been executed to them by the allottees beyond the indorsement of that scrip, yet the company would have been perfectly justified in issuing in its own name share certificates for the five thousand shares, and should have registered them in its own name.

In the case of *The Cheltenham Great Western Union Railway Co.* v. *Daniel* (*g*), referred to by Lord St. Leonards, an original subscriber to a projected railway company sold his scrip to the defendant; the company, after its formation, had notice of this sale from the defendant himself; he claimed to be registered in respect of the scrip which he had purchased, and he sent the certificates for such scrip to the company. The company gave him a receipt for the certificates, and registered him as a shareholder. It was held that he was properly registered, and that he was a shareholder, although the shares purchased by him had never been formally transferred to him from the vendor, as required by the company's special Act, and although the scrip certificates purported to be not transferable before the obtaining of the Act.

The learned Advocate General cited *Stanhope's case* (*h*), which was decided by Lord Cranworth in conformity with *Spackman's case* (*i*), decided by Lord Westbury, both decisions of high authority. But they proceeded on the ground that the acts of the directors were *ultra vires*, and

(*f*) 1 E. & E. 888.
(*g*) 2 Q. B. 281.
(*h*) Law Rep. 1 Ch. Ap. 161.
(*i*) 11 Jur. N. S. 307.

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that they could not be permitted to pervert their power of forfeiting shares, so as thereby, collusively with shareholders, to relieve them of their responsibility as such. Nor does the case of *Jamnádás Savaklál* (*j*), which was also mentioned, apply in the present instance. The purchases there were made by certain directors in their individual capacity, not as here by the directors in a body on account of the company.

They, so far back as January 1865, caused three lists to be made out, by their principal officer, Mr. Weatherhead, of the shares of the company—one containing shares still in the market, a second containing shares mortgaged to the company, and a third containing shares purchased by the company. That third list contained the whole of the five thousand shares, and is an ample acknowledgment by the directors (who represented the company in this matter) of the purchase of those shares for the company. Further it appears, on the evidence of Mr. Weatherhead, that no notice of the second call was issued to the original allottees of those five thousand shares. The company, therefore, through its directors, have, not only by the act of purchase, but by their subsequent conduct, treated themselves as the owners of the shares. They cannot, I think, be permitted to take advantage of their own neglect or that of their officers, in not registering the five thousand shares in the name of the company; and, although not altogether without hesitation, I have come to the conclusion that the names of the original allottees of the five thousand shares must be removed from Part II. of the list of contributories.

The result, therefore, is that all of the names in Part II. must be removed, as well the allottees of the two thousand shares as those of the five thousand shares, and the name of the company substituted as holders of the whole seven thousand shares.

No costs to the original allottees.

Application granted.

(*j*) *Antè*, p. 125.

ECCLESIASTICAL SIDE.

In the Goods of NAGINDAS (*deceased*).

Indian Registration Act, 1866, *Secs.* 44, 45, 46, 65, *and* 77—*Deposit of Will—Probate—Jurisdiction.*

A Testator deposited his Will in a sealed cover with the Registrar of Assurances at Bombay, under Sec. 44 of Act XX. of 1866; and upon his death his executors applied to the Registrar to deliver over to them the Will, in order to enable them to apply to the High Court for Probate thereof. The Registrar gave a copy of the Will, under Sec. 46 of the Act; but refused to part with the original.

On application by the executors for a citation to the Registrar General, to bring the Will into Court, and deposit it with the Ecclesiastical Registrar:—

Held that the original should be brought into Court, where alone the *factum* of the Will could be tried and determined; and that a copy, authenticated under Sec. 65 of the Act, was not sufficient.

The Registrar General should not, after the death of the depositor of a Will, part with it otherwise than by order of the Court.

1867. March 1. *In the goods of* NA'GINDA'S.

SCOBLE, on behalf of the applicants, who were the executors of the will of Nagindás, deceased, moved for an order to the Ecclesiastical Registrar, directing him to issue a citation, under the seal of the Court, to the Registrar General of Assurances, or to the Registrar of Bombay, to bring in and deposit with the Ecclesiastical Registrar the last Will and Testament of the Testator, substituting in the records of the Registrar General an authenticated copy thereof which had been granted to the applicants.

Nagindás made and published his last Will in Gujaráti on the 27th of June 1866; and on the 2nd of July following deposited it with the Registrar of Assurances at Bombay under a sealed cover, pursuant to Sec. 44 of Act XX. of 1866. Nagindás died in Bombay on the 21st of September 1866; and the applicants, who were executors of the Will, in the month of February 1867, applied to the Registrar of Assurances to deliver over to them the original Will, which had been deposited as above mentioned, in order to enable them to apply for grant of probate thereof. The Registrar refused to part with the original Will, but gave to the applicants an authenticated copy thereof under his seal of office.

1866. March 15 *In the goods of* NA'GINDA'S.

WESTROPP, J.:—This is a new point; as similar cases are likely to occur frequently, I shall defer my decision until I have mentioned the matter to the Chief Justice.

Cur. adv. vult.

WESTROPP, J.:—The Registrar General has declined to give up the Will in this case, relying on Secs. 44, 45, 46, and 65, of the Act. Those sections and Sec. 77 were referred to by Mr. Scoble. I have mentioned this matter to the Chief Justice; and we think that the suggestion which has been made in the Registrar General's Department, that a copy would be sufficient, is untenable. In this court alone can the *factum* of the will be tried and determined; and for that purpose it is absolutely necessary that the Will itself should be brought into court.

It never could have been the intention of the Legislature without express words to interfere with the Probate jurisdiction of this court. And there is nothing in the Registration Act which affects to do so. This court has the power to call upon the Registrar General of Assurances, as well as upon anybody else, to bring a Will in his custody into court.

The Registrar General should make a copy of the Will for his archives, and make a note on it that the original has been removed into this court by its order to that effect; and it would be well that he should file the order in his office with that copy.

It should be clearly understood that the Registrar General ought not to give up a Will when applied to by a party interested in its production, but should wait for an order of this court.

The Court ordered that the Will should be lodged in court, and at the same time directed the Ecclesiastical Registrar to write to the Registrar General a letter communicating to him the views of the Court.

Referred Case.

WHATELEY v. PA'LANJI PESTANJI.

Innkeeper and guest—Boarding-house-keeper and lodger.

In a suit brought to recover the value of certain articles stolen from the plaintiff's rooms at an hotel in Bombay; the defendant being the licensed proprietor of the hotel, who was in the habit of entertaining, for shorter or longer periods, all comers willing to pay the usual charges; and the plaintiff being an exchange broker doing business in Bombay, who had lived at the hotel for more than a year, paying for his board and lodging, at first by the day, and afterwards, by agreement, *at the rate of* so much a month—but neither was the plaintiff under any obligation to remain, nor the defendant to accommodate him, for any fixed time :—

Held that the relation of innkeeper and guest (and not that of boarding-house-keeper and lodger) subsisted between the parties; and that the defendant was, *primâ facie* and without proof of actual negligence, liable to make good the loss sustained by the plaintiff.

There is no law but the Common Law of England to regulate the relation of innkeeper and guest in Bombay, in a case between a European and a Pársi.

1866. September 6. Referred Case.

CASE stated for the opinion of the High Court by J. F. Hore, First Judge of the Bombay Court of Small Causes :—

"In this case the defendant is sued, as a common innkeeper, for the value of certain articles which were stolen from the plaintiff's rooms at the Adelphi Hotel, whilst he was residing there as a guest.

"The facts proved at the trial are as follows :—The defendant is the licensed proprietor of the Adelphi Hotel at Byculla, where he is in the habit of receiving and entertaining, for shorter or longer periods, all such visitors as are able and willing to pay the usual charges. The plaintiff, an exchange broker in Bombay, lived at the hotel on the last occasion for seventeen months, from July 1864 to December 1865. At first he paid for his board and lodging by the day; but subsequently, by agreement, at the rate of Rs. 180 a month, the daily charge during the latter period being Rs. 9 a day. His rooms, a sitting and a bed room, situate the one behind the other, and divided by a screen, were furnished partly by himself and partly by the defendant. They

1866. September 6. Referred Case.

formed one of several sets of rooms, having a veranda in front and another in the rear, both common to all the rooms. The door between the plaintiff's bedroom and the back verandah was fastened inside by an iron hook, which was capable of being unfastened from the outside. On the 24th or 25th of September last the plaintiff returned from his office about half-past three o'clock in the afternoon; and having placed his watch, chain, and two rings on the top of a chest of drawers, laid himself down on his bed and fell asleep. On awaking, about five o'clock, the articles were missing, and have never since been found. Several petty thefts have occurred at the hotel; and the plaintiff frequently remonstrated with the defendant, without avail, on the subject. At the time of the loss, the plaintiff had a butler and one or two outdoor servants; but on that day the butler had obtained leave of absence early in the morning, and was not seen again at the hotel until six o'clock in the evening: it was not attempted to be shown that any of the plaintiff's servants were implicated in the theft. When the plaintiff laid himself down to sleep, the front door of the sitting room, as well as that between the sitting and bed room, was open; but, whether the door between the latter and the back veranda was open, or whether the thief made his entry from the front or back veranda, does not appear. It was also proved that the value of the goods lost amounted to Rs. 1,000.

"It was contended, on behalf of the defendant, that he and the plaintiff stood in the relative position of boarding-house-keeper and boarder, and not in that of innkeeper and guest; that the common law of England with respect to innkeepers is not applicable to Bombay; and that the loss was occasioned by the negligence of the plaintiff. The Court decided all the questions in favour of the plaintiff, and gave him a verdict, subject to the opinion of the High Court, for Rs. 1,000 and costs. A written judgment was delivered, of which a copy is annexed.

"The opinion of the High Court is, therefore, requested:—
(1) Whether, upon the facts proved, the plaintiff and defend-

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ant stood in the position towards each other as guest and innkeeper, or of boarder and boarding-house-keeper; (2) Whether the common law of England relating to innkeepers is applicable to Bombay; (3) Whether, under the circumstances stated, the Court was right in giving a verdict in favour of the plaintiff.

(*Judgment.*)

"The question principally discussed at the hearing was, whether the relationship that existed between the plaintiff and the defendant was that of 'guest' and 'innkeeper,' or that of 'boarder' and 'boarding-house-keeper:' but another and very important question arises, whether the common law of England relating to innkeepers is applicable to this country. At first I was inclined to think that it was not; but on reflection, having regard as well to the circumstances of the country as to the policy upon which that law is founded, I have arrived at a different conclusion.

"It is said that, as travellers in this country are usually accompanied by their own servants, their goods ought to be considered as in the custody of the latter, and not in the custody of the innkeeper. Even if (as is not the case) travellers in India always took their servants with them, and their masters' goods were always given into their charge, the custody of the servant (unless exclusive, under express agreement) would not, I apprehend, exempt the innkeepers from responsibility for loss, any more than the ordinary custody of the master himself would have that effect: for, according to the common law of England, it was immaterial in whose actual custody the goods were, so long as they were brought within the inn. In *Calye's Case* (*a*), which is the leading authority on this subject, it is laid down that although the innkeeper had delivered to the guest the key of the chamber in which he lodged, and the goods were stolen in consequence of the latter having left the door of his chamber open, the innkeeper was liable. 'A delivery of the goods into the custody of the innkeeper is not necessary to charge him with them; for although the guest doth not de-

(*a*) 8 Co. 32; 1 Smith L. C. 102, 5th ed.

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liver them or acquaint the innkeeper with them, still the latter is bound to pay for them if they are stolen or carried away; even although the persons who stole or carried them away are unknown:' Story, Bailm., Sec. 479, citing *Calye's Case.*

"Again, it is contended that the law on this subject had its origin in uncivilised times, and is unsuitable to the exigencies of the present age; and that, as hotels in this country are of recent existence, the extraordinary responsibility to which innkeepers and hotel-keepers in England are subjected, ought not now for the first time to be extended to hotel-keepers in Bombay. The law had its origin in the edict of the Roman prætor, and has been adopted, with various extensions and modifications, by most, if not all European countries; and although in many States in America, inns are regulated by special statute, this branch of our Common Law is understood to prevail in all the States except Louisiana. It is considered to have been adopted, on the ground of public policy and from necessity, by all countries whose jurisprudence is based on the Roman law; and the necessity for its existence appears to be at least as urgent here at the present day as it was formerly found to be in other countries. In Story, Bailm., Sec. 464, it is said: 'The soundness of the public policy of subjecting particular classes of persons to extraordinary responsibility, in cases where an extraordinary confidence is necessarily reposed in them, and there is an extraordinary temptation to fraud or danger of plunder, can hardly admit of question.' In Burge's Col. Laws, Vol. III., p. 692, it is stated that 'the extraordinary confidence reposed in innkeepers and common carriers, and the temptation and facilities afforded them to violate that confidence, are assigned as the motives which justified the edict.' In *Holder* v. *Soulby* (*b*), *Byles*, J., in the course of his judgment, with reference to the loss of goods, says: 'It is a wholesome rule that if the goods are at an inn, the innkeeper is responsible for them; but that, if they are in a mere lodging-house, the lodger shall be bound to take care of the

(*b*) 8 C. B., N. S., 254.

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goods himself.' And it has been observed by Sir William Jones that, 'rigorous as this rule may seem, and hard as it may actually be in one or two particular instances, it is founded on the great principle of public utility, to which all private considerations ought to yield. For travellers, who must be numerous in a rich and commercial country, are obliged to rely almost implicitly on the good faith of innholders, whose education and morals are none of the best, and who might have frequent opportunities of associating with ruffians and pilferers, while the injured guest would seldom or never obtain legal proof of such combinations, or even of their negligence, if no actual fraud had been committed by them:' Jones on Bailm. 95. The reasons given by Sir W. Jones for the existence of the law in England, appear to me to apply to the circumstances and condition of this country at the present day, with the same force that they applied to the circumstances of England at the time he wrote his work on Bailments. Had the law on this subject been considered unsuitable to the present civilised state of society in England, there is no doubt it would have been entirely repealed before now. So far from this having been done, the principle and justness of the law have lately been recognised by the Legislature, in passing 26 & 27 Vic., c. 104, although they have by that Act limited, under certain circumstances, the liability of innkeepers. I am, therefore, of opinion that, as this particular law is a part of the general Common Law of England, which was introduced into India in 1726, it ought to be considered to have been introduced at that time, and that it ought to be allowed to prevail here, until repealed or amended by the Legislature.

"The next questions are, whether the defendant is an innkeeper, and whether the plaintiff is a guest. An innkeeper has been defined to be 'the keeper of a common inn for the lodging and entertainment of travellers and passengers, their horses, and attendants, for a reasonable compensation:' Story, Bailm., Sec. 475, citing Bac. Abr., *Inns*, C. In *Thompson* v. *Lacy* (c), *Bayley*, J., says: 'I take the true

(c) 3 B. and Ald. 286.

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definition of an inn to be, a house where the traveller is furnished with everything which he has occasion for whilst upon his way.' 'An innkeeper, moreover, is bound to take in all travellers and wayfaring persons, and to entertain them, if he can accommodate them, for a reasonable compensation:' Story, Bailm., Sec. 476. And there is no distinction either in law or in the ordinary meaning of the words, between an inn and an hotel, the name hotel being given, according to Webster's and other dictionaries, to any inn. The defendant, upon his own evidence, clearly satisfies these requirements. Then, can the plaintiff be strictly regarded as 'a guest'? The writ in the Registrum Brevium, 'which is in such case the ground of the common law,' shows that to be 'a guest' a person must be 'transiens.' And in *Calye's Case* it is laid down: 'The words are *ad hospitandos homines per partes ubi hujusmodi hospitia existunt transeuntes, et in eisdem hospitantes:* by which it appears that common inns are instituted for passengers and wayfaring men; for the Latin word for an inn is *diversorium,* because he who lodges there is *quasi divertens se a viâ,* and so *diversorium.* And, therefore, if a neighbour, who is no traveller, as a friend, at the request of the innholder, lodges there, and his goods are stolen, &c., he shall not have an action: for the writ is *ad hospitandos homines* &c., *transeuntes, in eisdem hospitantes,* &c.' Here the word *transiens* has been translated 'a traveller,' 'a passenger,' 'a wayfaring man;' but, although it literally embraces persons who are usually designated by those terms, it clearly extends further, and applies to persons who may be 'passing on,' to 'sojourners,' and to persons who avail themselves of the *hospitium* temporarily, and for no fixed time. And this interpretation of the word seems to be supported by authority. 'The length of time that a man is at an inn makes no difference; whether he stays a week, or a month, or longer; so always that, although he is not strictly *transiens,* he retains his character as a traveller. And if he still is in reality a traveller, the making of a special agreement with the innkeeper for the price of his board by the week will not

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change his character as a guest, and make him a mere boarder.' Story, Bailm., Sec. 477. 'If A comes with goods to an inn in London, and stays there for a week, month, or longer, and is there robbed of them, he shall have an action against his host; though, perhaps, being at the end of his journey, he cannot then be said to be *transiens*, according to the writ in the register:" Bac. Abr., *Inns*, C. 5. In *Thompson* v. *Lacy* it was contended that the plaintiff, who had resided at an inn in London for several months, was not a guest, 'inasmuch as he had previously been continually resident in London,' and therefore was not a traveller or wayfaring man, but it was nevertheless decided that he was a guest in that case; the marginal note, which correctly represents the facts, is in these words: 'A house of public entertainment in London where beds, provisions, &c. are furnished for all persons paying for the same, but which was merely called a tavern and coffee-house, and was not frequented by stage-coaches and waggons from the country, and which had no stables belonging to it, is to be considered an inn; and the owner is subject to the liability of innkeepers, and has a lien on the goods of his guest for the payment of his bill; and that, even where the guest did not appear to have been a traveller, but one who had previously resided in furnished lodgings in London.' And one of the Judges, *Best*, J., in delivering judgment, says: 'An inn is a house the owner of which holds out that he will receive all travellers and *sojourners* who are willing to pay a price adequate to the sort of accommodation provided, and who come in a situation in which they are fit to be received.'

"These authorities show clearly, I think, that the plaintiff in the present case is legally a guest, unless the other circumstances disclosed by the evidence are sufficient to clothe him with a different character. It was contended on behalf of the defendant, that the plaintiff had entered into an express contract with him for board and lodging, and that he was consequently a boarder, and not a guest. Had this been proved, the defendant would have been exempt from responsibility; but there appears to me to be a total absence of

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facts to support the contention. The cases relied on by Mr. Leathes were *Parkhurst* v. *Foster* (*d*), and *Thompson* v. *Lacy, suprà.* Both of these authorities are directly adverse to the defendant. The first is reported in different places, but from the report in Salkeld it appears that the action was brought for 'Trespass, for quartering a dragoon upon the plaintiff to find him meat and drink, and hay and straw for his horse, &c. Upon 'not guilty' pleaded, a special verdict was found, that the plaintiff kept a house at Epsom *et dimisit conclavia,* Anglicè lodgings, *talibus quales ibid. accedebant propter salubritatem aëris, et potionem aquarum,* &c., and that he dressed meat for his lodgers at four pence per joint, and sold them small beer at two pence per mug, and also found them stable-room, hay, &c. for horses, at such and such rates; and that the defendant, being a constable, quartered a dragoon upon the plaintiff. *Holt,* C.J., when this case was set down for the resolution of the Court, gave judgment for the plaintiff, and said the case was so plain, that there was no occasion for giving reasons;' thereby deciding that the plaintiff was a lodging-house-keeper, and not an innkeeper. But in 12 Mod. Rep. 254, where the case is reported as *Parker* v. *Flint,* it is said, 'In this case *Holt,* C. J., held that 'if one come to an inn, and make a previous contract for lodging for a set time, and do not eat or drink there, he is no guest, but a lodger, and as such is not under the innkeeper's protection; but if he eat and drink there, it is otherwise; or if he pay for his diet there, though he do not take it there. And a sign is not essential to an inn, but is an evidence of it.' Had the case now before the Court been before *Holt,* C.J., as the plaintiff did eat and drink at the hotel, he would most undoubtedly have held him to have been a guest. The other case, *Thompson* v. *Lacy,* involved no question of special contract at all, and was to the effect already mentioned.

"In the case before the Court, there was in reality no agreement for board and lodging for a set time, but merely an agreement, entered into some time after the plaintiff became a resident at the hotel, to pay at the rate of so much a

(*d*) 1 Salk. 388.

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month, instead of, as he had previously done, paying so much a day. The defendant himself stated in his evidence that the plaintiff agreed to pay, not so much a month, but at the rate of so much a month; so that if he left at any time before the expiration of a month, he would only be charged up to the time he left. There was no obligation on the part of the plaintiff to remain any fixed time; he might have left on any day he pleased, without notice; and it was always uncertain how long he might find it convenient, or how long he might think fit, to stay. He was, therefore, strictly speaking, *transiens*, and therefore, according to Common Law, a 'guest.' And as the relationship of guest and innkeeper subsisted between the parties, the defendant is, *primâ facie*, and without proof of actual negligence, liable to make good the loss sustained by the plaintiff. It was open to the defendant to repel by evidence, if he could, this presumptive liability, by showing that the loss was occasioned by the fault of the plaintiff; or that it arose from other circumstances for which innkeepers are not responsible. No attempt was made to do this, except that it was said that the loss occurred from the plaintiff's doors being left open, and that it was negligence on the part of the plaintiff to leave them open. But to leave doors open is the rule rather than the exception in this country, and the case of *Kent* v. *Shuckard* (*e*) shows that the defendant would formerly have been liable under such circumstances even in England.

"The plaintiff is, therefore, entitled to recover; and, as the evidence of the plaintiff as to the value of the articles lost has not been controverted, a verdict must be entered in his favour for Rs. 1,000 and costs. Attorneys' costs, Rs. 51, certified for.

The case was heard before ARNOULD and WESTROPP, JJ.

McCulloch and *Green*, for the appellant, defendant in the court below:—The parties in this case were rather in the relative position of boarder and boarding-house-keeper than of guest and innkeeper. The plaintiff had entered into a

(*e*) 2 B and Ad. 803.

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special arrangement with the defendant to board at his "hotel," in consideration of his paying at the rate of Rs. 180 *per mensem*, in place of Rs. 9 *per diem*, which was the ordinary rate. The "hotels" in Bombay were more like boarding-houses in England: inasmuch as persons staying in them were charged by the day, and not by the meal. The plaintiff, moreover, had himself partly furnished the rooms which he occupied; and had remained in them for seventeen months. Besides, he carried on business in Bombay, and had an "office," so that he could not be considered a mere sojourner.

Pigot and *Mayhew*, for the respondent, contended that the arrangement entered into between the parties was not such as to alter the position in which they previously stood to each other—of guest and innkeeper. There was no agreement for a set time.

Cur. adv. vult.

September 7.

The judgment of the Court was given this day (ARNOULD, J., concurring) by—

WESTROPP, J.:—There is no law, but the Common Law of England, to regulate the relation of innkeeper and guest in Bombay in a case between a European and a Pársi. The effect, if any, upon that relation, of the reservation which was made, in the charter of the Supreme Court, in regard to the law of contract as between Gentoos, and the law of contract as between Muhammadans, is not now in question; we have neither Gentoos nor Muhammadans to deal with in this case.

The next point is the point of difficulty in the case:—Was the plaintiff a lodger, or what the English law deems to be a guest? We say a guest, because we think that for a long time past the question in such cases has been, not so much whether the person, who seeks to make the innkeeper liable, is a traveller, as whether he is a guest. It is clear that the plaintiff would not be a guest if there had been a demise to him, for a time certain, of the rooms which he occupied: *Walbrook* v. *Griffith (f)*, where it was said that

(*f*) Sir F. Moore, plac. 1229, p. 877.

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it was resolved, in the case of an attorney who hired a chamber in an inn for the whole of the Term of Court, that the innkeeper was not chargeable for a robbery during that time, because the party was *quasi* a lessee. And the dictum of *Jones*, J., in *Drope* v. *Thaire* (*g*), to which we shall presently refer, we interpret as meaning that, in order to relieve the innkeeper of his liability at Common Law, there must be a special agreement by which one party demises and the other takes the apartment for a time certain.

From the written judgment of the learned First Judge of the Small Cause Court annexed by him to the special case, and which, by reason of his reference to it in that case, we think we may treat as incorporated in it—there appeared to have been nothing which could be held to amount to a demise of any of the apartments at the hotel by the innkeeper, the defendant, to the plaintiff. The First Judge said: "There was in reality no agreement for board and lodging for a set time; but merely an agreement, entered into some time after the plaintiff became a resident at the hotel, to pay at the rate of so much a month, instead of, as he had previously done, paying so much a day. The defendant himself stated in his evidence that the plaintiff agreed to pay, not so much a month, but at the rate of so much a month; so that, if he left at any time before the expiration of a month, he would only be charged up to the time he left. There was no obligation on the part of the plaintiff to remain any fixed time; he might have left on any day he pleased without notice; and it was always uncertain how long he might find it convenient, or how long he might think fit, to stay."

With those facts before us, it is impossible to say that, on the one side, the innkeeper could have insisted on the plaintiff remaining for a month, or paying for a month, whether he stayed during that period or not; or, on the other side, that the plaintiff could have insisted on being allowed to remain for a month, if it did not please the innkeeper that he should so remain. We do not think that there was any-

(*g*) Latch's Rep. 126, 127.

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thing in what took place between the parties that could be treated as a demise for a month, or for any fixed time, or as an agreement for such a demise.

It is reported by Latch to have been said by *Doddridge*, J., in *Gulialm's case* (*h*), that if a passenger lodged for three days together in an inn, the innkeeper was not responsible for goods: but that supposed *dictum* is inconsistent with the decision in *Drope* v. *Thaire*, reported at page 127 of the same volume, where it was held unnecessary to aver that the sojourner in the inn was *transiens*; *Doddridge*, J., saying that clothiers who came to London to sell cloth, and stayed for a week or more, or men who came up to attend Term, nevertheless might maintain an action (for loss of their property) against their host, he being a common innkeeper. *Jones*, J., concurred; but said it would be otherwise if the party stayed for quarter of a year and boarded there. But if he stayed half a year without such agreement for board &c., the case would be within the custom. I have already stated the interpretation which we place upon those not very clearly reported remarks of Jones, J.

The *dictum* in *Gulialm's case* is especially inconsistent with *Thompson* v. *Lacy* (*i*), from which it appeared that the time the guest stayed (eighty-three days in that case) did not alter the relation of innkeeper and guest, unless there was a special agreement which changed the condition of the latter from that of guest to that of lodger. And in *Story* on *Bailments* there was an American case mentioned in a note to plac. 447, where it appeared to have been laid down that the length of time made no difference.

In Burns' *Justice*, Title "Alehouse," Sec. XVI. (*e*), it is said that "it is necessary to render the innkeeper thus liable, that the party leaving the goods in the innkeeper's custody should, at the time of the injury, be a guest at the inn. One who goes casually to an inn and eats and drinks or sleeps there, is a guest, although not a traveller, &c. &c. So

(*h*) Latch's Rep. p. 88. (*i*) 3 B. & A. 283.

(*j*) pp. 116, 117, 29th ed. by Chitty.

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is one who remains at the end of his journey at an inn, without a special contract, even for a half-year."

We do not think the fact of the plaintiff having some furniture of his own in the room—especially when we recollect what the habits of people in this country are—could alter the case. It would be very difficult to draw the line and say what amount of furniture made a person a lodger, and when in fact he ceased to be a guest—whether it would be one chair, or half a dozen chairs, in addition to the furniture already in the apartments. We think it would be a very unsatisfactory basis to rest a decision upon.

Here we have it stated by the learned Judge that the defendant was a common innkeeper, and that he entertained all comers; and that, as an ordinary comer, the plaintiff entered the inn, and was accommodated for a certain time, and the only alteration which appeared to have taken place in the terms as to which he remained in the inn, was that, instead of paying so much *per diem*, as he had paid at first, he was to pay at such a rate *per mensem*, and in the event of his going away at a broken period, before a month was completed, he was to pay for the expired portion of the month only. But we do not think that affected his character of guest in the slightest degree, or gave any certainty to his tenure: it was only the mode or rate of payment that was altered.

Under those circumstances we think the plaintiff must be regarded as simply a guest, and not as a lodger; and that the judgment should be affirmed, each party paying his own costs of the reference; the question being one of some nicety, and the distinction between a lodger and a guest being only a slight one, under such circumstances as were disclosed in the present case.

Judgment affirmed.

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ALLA'RAKIA' ALI' v. GEACH.

Debtor and Creditor—Substitution.

The defendant being indebted to the plaintiff in the sum of Rs. 574-5-0, the amount of plaintiff's bill against the ship "Compta," of which the defendant was master, they both went to the office of the ship's dubásh in Bombay, where the defendant signed the bill as correct, and ordered the dubásh to pay the amount. The dubásh gave the plaintiff Rs. 500 in cash, saying he would pay the balance next day. The plaintiff said he would prefer a "receipt" for his bill, and returned the Rs. 500. An acknowledgment was then given to him, by which the dubásh promised to pay the bill for Rs. 574-5-0, "immediately on the money being received from Mr. S."

On the day following, the plaintiff took out a summons in the Small Cause Court against the defendant, whom he arrested, on making an affidavit that he was about to leave Bombay; and the Court held that "there was no valid substitution of the liability of any person or fund, in place of the original liability of the defendant;" and gave judgment for the plaintiff for Rs. 574-5-0 and costs; which judgment, as to the principal sum, was affirmed by the High Court, but costs on the sum of Rs. 500, originally paid to, and returned by, the plaintiff, were disallowed.

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CASE stated for the opinion of the High Court, pursuant to the provisions of Sec. 55 of Act IX. of 1850, and Sec. 7 of Act XXVI. of 1864, by John O'Leary, Acting First Judge of the Bombay Court of Small Causes:—

"This action was brought to recover the sum of Rs. 587-5-0, for goods supplied by the plaintiff to the British ship 'Compta,' of which the defendant was master. On the 27th of June, the ship being about to leave Bombay, the plaintiff applied to the captain for payment of an account against the ship, Rs. 574-5-0.

"About four P.M. on that day, the captain and the plaintiff arrived at the office of Kharsedji Mancharji, the dubásh of the ship. The plaintiff demanded a settlement of his account. The defendant signed the account as correct, and directed the dubásh to enter the amount in the ship's general account against the owners, which the dubásh did. The dubásh thereupon handed to the plaintiff Rs. 500 in cash, as a payment on account, stating that he would pay the balance on the next day. The plaintiff at first accepted the money; but

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in a few minutes returned it, saying he did not care about having cash, and would prefer an acknowledgment from the dubásh for the entire amount.

"Owing to the prevarication of the plaintiff in the witness-box, it was impossible to ascertain precisely what it was he asked from the dubásh. He stated, however, several times in the course of his evidence, that what he asked for was 'a receipt for his bill.' Thereupon the dubásh wrote and handed to the plaintiff a Gujaráti document, of which the following is a translation:—

'To Memon Allárákia Alí, written by Pársi Kharsedji Mancharji Subhedár; to wit: There is one bill of the bum-boatman in respect of the ship "Compta" (for) Rs. 574, namely, five hundred and seventy-four; this money is to be duly paid to you immediately on being received from Mr. Shepherd. Pársi Kharsedji Mancharji Subhedár: his own handwriting.' This document bore an adhesive stamp of the value of one anna.

"This document was either read by or explained to the plaintiff, who expressed himself perfectly satisfied. The parties left the office of the dubásh, and the defendant shortly afterwards returned on board his ship. It was understood by all parties at the aforesaid interview that the 'Compta' was to sail on the following day (28th), and she did leave her moorings at some time in the evening of that day.

"At about three or four P.M. on the 28th of June, the plaintiff applied to me on an affidavit: stating that the sum of Rs. 587-5-0 was due to him by the defendant; that a summons had been issued from the court; and that the defendant was about to leave Bombay. I issued the usual warrant; and on the evening of the 28th the defendant was arrested on board his ship in the Bombay harbour, after she had left her moorings, and brought on shore. He paid into court under protest the sum of Rs. 647-14-3, and was discharged, and proceeded on his voyage. No evidence was offered to me as to the sum of Rs. 13, claimed in the summons for goods supplied on the 27th of June.

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"Upon proof of the foregoing facts, Mr. Judge, for the defendant, contended that the plaintiff had, for valuable consideration, agreed to accept either the dubásh, or Mr. Shepherd, or the owners or the agents of the ship 'Compta' in Bombay, as his debtor in the place of the defendant; and that there should be a verdict for the defendant.

"Dr. Reid, for the plaintiff, contended that there was no substitution of any other debtor in place of the defendant.

"Mr. Judge required me to give judgment, contingent upon the opinion of the High Court, upon the following questions:—(1) Whether the acts and representations of the plaintiff, in the office of the dubásh on the 27th of June, and his acceptance of the Gujaráti document, did not amount to a valid discharge of the defendant from his liability to the plaintiff; (2) Whether, under the above circumstances, an application by the plaintiff to the dubásh for payment, and a refusal by the dubásh, were not conditions precedent to the plaintiff's right (if any) to sue the defendant.

"I was of opinion that there was no valid substitution of the liability of any person or fund, in place of the original liability of the defendant; and, contingent on the opinion of the High Court as aforesaid, I gave a verdict for the plaintiff for Rs. 574-5-0 and costs: And I request the opinion of the High Court with respect to the two questions aforesaid."

The case came on for hearing this day before SAUSSE, C.J., and COUCH, J.

Taylor for the appellant, defendant in the court below.

No one appeared for the plaintiff.

PER CURIAM:—The Court confirms the judgment of the Court of Small Causes as to the principal sum payable, namely, Rs. 574-5-0; but varies the same as to the costs, and orders that judgment be entered for the plaintiff for Rs. 574-5-0, and costs to the amount only of costs properly payable on the recovery of Rs. 74-5-0, and no costs for the warrant issued for the arrest of the defendant; and the Court further orders that each party do bear his own costs of the reserving and stating the case for the opinion of this Court.

Original Suit No. 583 *of* 1865 ; *Appeal No.* 69.

THE ROYAL BANK OF INDIA ...*Plaintiff and Appellant.*
HORMASJI KHARSEDJI .....*Defendant and Respondent.*

Stamp—Rejection of document—Appeal.

Held that an appeal lies to the High Court from the decision of a Judge in a Division Court rejecting a document, tendered in evidence under Sec. XVII., cl. 1, of Act X. of 1862, on the ground that there had been an intention to evade the payment of stamp duty.

The point upon which the decision of the Court is to be final, under Sec. XVII. of the Stamp Act, is as to what is the proper amount of stamp duty which the document ought to bear, and not as to whether the Court ought, or ought not, to receive the document in evidence.

A Court to which a document is tendered in evidence under Sec. XVII. ought not to reject it, unless it clearly appears that there was an intention to evade the payment of stamp duty.

1866. August 4. Appeal No. 69.

THIS was an appeal from the decision of Sir JOSEPH ARNOULD, who gave judgment for the respondent—one of two defendants in the original suit—on the 29th of June 1866.

The suit was brought on a joint and several promissory note for Rs. 1,00,000; and the first defendant admitted his liability. On the note being tendered in evidence, it was objected to, on behalf of the second defendant (now respondent), as it bore only an adhesive stamp, which it was contended was, moreover, of inadequate value,—the note, though purporting to be payable on demand, being really intended by the parties to it to be payable three months after date.

The Judge, after inquiry, refused to allow the document to be received in evidence upon payment of the penalty; and the case having been gone into as for money lent, judgment was given for the plaintiff as against the first defendant, but in favour of the second defendant with costs.

Howard and *Macpherson* for the appellant:—There was nothing on the face of the note to show that payment could not be demanded within three months; nor any evidence of a contemporaneous agreement which would control the operation of the instrument. There was, no doubt, an understanding between the parties that in all pro-

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bability payment would not be demanded till after the expiration of three months: but that understanding did not amount to an agreement; and the plaintiffs reserved to themselves the right to demand payment at any time. The exercise of that right was entirely within their discretion.

Scoble and *McCulloch* for the respondent:—The Judge of the Division Court found that there had been an intention to evade the payment of stamp duty, and that he was bound, on the evidence, to hold that the note sued upon was really a note payable three months after date. His decision on that point was final, under Sec. XVII. of the Stamp Act, No. X. of 1862; and an appeal did not lie. There was an express decision to that effect by the High Court at Madras: *Lakshmínáráyan Aiyar* v. *Suppara Gaudan* (*a*).

COUCH, C.J.:—The first question to be considered in this case is, whether there is a right of appeal to this court from the decision of the learned Judge upon the following point, namely, that as he thought a case was made out which should induce him not to exercise the power which he had, under Sec. XVII. of the Stamp Act, of receiving a document in evidence, and dealing with the matter in the same way that the Collector would have dealt with it, and of considering whether there had been an intention to evade payment of the stamp duty, he rightly came to that conclusion, and so rejected the document. The result of that rejection was that he made a decree in favour of the second defendant; and the plaintiff appeals against the decree so made.

Now the Charter under which the court is constituted—whether we look to the terms of the new Charter, or the terms of the old Charter, which was in force at the time this suit was heard—gives generally a right of appeal from the judgment of one Judge or of a Division Court to the High

(*a*) 2 Mad. H. C. Rep. 321. The suit was brought upon a writing originally unstamped; and the Munsif, having received the amount of the stamp duty and penalty when the plaint was presented, subsequently passed judgment for the plaintiff. On appeal the Principal Sadr Amín submitted to the High Court a question as to his competency to review the order of the Munsif, admitting the document in evidence; and the Court (SCOTLAND, C.J., and FRERE, J.) were of opinion that it was not competent for him to do so, under the provisions of Secs. 15, 16, and 17 of Act X. of 1862.—ED.

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Court; and I think that the right of appeal, which is so generally given by the Charter, ought to be expressly taken away by some words in a law which controls the operation of the Charter, if it was intended that it should not be exercised in a case like the present.

Sec. 17 of the Stamp Act, which, it is said, takes away this right of appeal, and makes the decision of the Judge final, says that, "in any case in which a stamp might be impressed under Sec. 15 of the Act, a Civil Court may receive in evidence a deed, instrument, or writing, not bearing the stamp prescribed by Schedule A, on payment into court of the proper amount of stamp duty, to be determined by the Court, whose decision on the point shall be final, together with the penalty required by the said section." I think that the ordinary import of these words is that the point upon which the decision of the Court is to be final, is as to what is the amount of stamp duty that the instrument ought to bear, and not whether the Court ought, or ought not, to receive the document in evidence. I do not think that the state of the English law can guide us on the subject, because it may well be that the framers of this Act considered that in India there should be a difference in the law from what it was in England; and in one respect certainly they have made a difference, in giving the power to stamp certain instruments after they have been executed, provided it should appear to the Collector that there was not an intention to evade the stamp duty.

That appears to me to be the meaning of the words in Sec. XVII., and I think that the judgment to which we have been referred—of the High Court of Madras—is really to the same effect. I do not think that the learned Chief Justice of Madras intended in that case to hold more than that the decision of the Court, when it admitted a document upon the payment of the penalty, and fixed what was the proper sum to be paid, was to be final: because he seems, referring to Sec. XVII., to ground his decision upon this, that the Court, so to speak, was in the same position as the Collector; and by Sec. 16 it is provided that the stamp which the

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Collector determines ought to be impressed upon a document "shall be taken in any court of justice to be the proper stamp." He appears, then, to think that the Court, which is put in the place of the Collector under Sec. XVII., is to do the same thing; and that the decision of the Court is intended to be final, in the same way as the decision of the Collector with regard to the proper stamp is intended to be final. His decision does not, I think, go beyond that; but even if it was intended by him to decide that whenever a document was admitted by the Court and the Court acted under Sec. XVII. by receiving it in evidence, such decision was to be considered final, the decision would not apply to the present case, where the document has been rejected by the Court, and where the consequences of the act of the Court are so very different from what they would be if the document were admitted;—the effect in the present case being to deprive the party of the means of enforcing payment of the debt due to him: whereas the effect in the other case is that, the document being admitted, the merits of the case are still to be determined by the Court.

I think, therefore, that on an appeal from a decree made by a Judge in favour of a defendant, in consequence of a decision that he came to, rejecting a document which was tendered in evidence, the Court is at liberty to review the decision.

The next question which we have to determine is, whether the learned Judge was right in the conclusion that he came to, that the case was one in which he ought not to allow the document to be received upon the payment of the penalty. The document itself certainly does not contain anything which would control its operation as a note payable on demand, because the word "due" is not followed by any date; and the circumstance that it was on a printed form with the word "due" upon it, makes this still stronger than it would have been if the word had been written, although the result in point of law would be the same, no words of memorandum sufficiently complete to control its operation appearing upon the note. The question was,

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whether there was other evidence of a contemporaneous agreement between the parties, which would control the operation of the note, and which would make the debt due on the note payable only at the expiration of three months. I think that this ought to be clearly made out by the party who seeks to do away with the effect of such a document as a promissory note, or bill of exchange; and that if agreements of this kind, which do not appear on the face of the instrument, were to be allowed to be set up as altering the operation of it, without very clear evidence on the point, a great injury would be inflicted on the negotiability and character of such instruments, with regard to the power which parties have of enforcing payment of them in courts of justice, would be greatly affected.

Now it appears to me that the evidence, putting it in the most favourable way for the defendant, is consistent with an understanding between the parties, that there was a liability to pay the amount of the note at any time when it was demanded, with an expectation—which in most cases of this kind is entertained, and reasonably entertained—that the demand will not be made for a certain period; but that the parties are not to be bound in this respect, as if there was an actual agreement not to demand payment for three months. I cannot think that there was an intention on the part of the bank so to bind itself, that it could not, under any circumstances whatever, enforce payment of the note for a period of three months. I think that the intention was rather what Mr. Gordon states, that they were reserving to themselves the power of calling for payment of the note at any time they thought fit, although there was a very great probability that the payment would not be called for till after a period of three months.

But whatever was the intention—and my own impression is in favour of the document being intended to be such as would give them the power of enforcing payment of it at any time—unless we can see that the intention was decidedly the other way, and that, whilst executing an instrument which was intended to bind them not to call for

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payment of the money for a period of three months, they were drawing the note in that form for the purpose of evading the payment of the stamp duty—which, it is to be observed, would not have been paid by the bank, but by the borrower of the money—I think that we ought not to come to the conclusion that the document should not be received upon payment of the penalty. I think—putting the case most strongly in favour of the defendant—there is so much doubt upon the matter, that we should not be justified in saying that there was an intention to evade the payment of the duty; and that that was the reason for drawing the document in the form in which we find it. And it is to be observed, that if the intention was as Mr. Gordon has stated, it was impossible for the bank to allow the note to be stamped as a note payable only at the end of three months, because that would have prevented them from doing what they were desirous of obtaining the power of doing.

It appears to me that we cannot satisfactorily come to the conclusion that the intention was to evade payment of the duty. That being so, I think the learned Judge was not justified in refusing to receive payment of the penalty, and to allow the note to be given in evidence; and his decree having been based upon that preliminary objection, it must be reversed, and the case remanded for re-trial. The costs of the appeal will be costs in the suit, and will be dealt with according to the result of the suit.

SARGENT, J.:—I concur.

Suit remanded.

Original Suit No. 50 *of* 1866; *Appeal No.* 75.

MA'NEKJI SORA'BJI.....*Plaintiff & Appellant.*
C. N. CA'MA' and others ..*Defendants & Respondents.*

Illegal Company—Suit against, to compel delivery of share certificates—Acts XIX. of 1857 *and VII. of* 1860*—Partners.*

In a suit brought by a transferee of shares in a joint stock banking company, formed after the passing of Act VII. of 1860, and neither incorporated nor registered when the plaint was filed, to compel the directors, trustees, and public officer of the company to give up the share certificates which had come into the possession of the bank, or to pay damages to the plaintiff :—

Held (by *Couch*, C.J., and *Sargent*, J., affirming, in appeal, the decree of *Arnould*, J.) that, the company being illegal, under Sec. 2 of Act XIX. of 1857, the suit was not maintainable.

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August 6.
O. S. No. 50 of 1866.

APPEAL from the decision of Sir Joseph ARNOULD, J.

The original suit was brought by the plaintiff as shareholder of the Central Bank of Western India, which, when the plaint was filed, was neither incorporated nor registered. The first four defendants were the directors of the bank, the fifth, sixth, and seventh were the trustees, and the eighth (Jehángir Gustádji) was one of the public officers of the company appointed under Clause 191 of the Deed of Settlement.

The plaint stated that the plaintiff was the registered holder of 275 original and 152 additional shares in the bank; that all the calls, heretofore made, had been paid; that the plaintiff was not indebted to the company; that the certificates of the said shares came into the possession of the defendants, and now remain in their possession; that the plaintiff had applied for the certificates, but the defendants refused to give them up; and the prayer was that the defendants, or some of them, may be, decreed to deliver up the certificates, or to pay to the plaintiff Rs. 90,524.

The written statement alleged (paras. 2 and 3) that the shares originally stood in the name of N. A. Dávar, the master of the plaintiff, who was largely indebted to the bank; (para. 4) that the said Dávar had, without consideration, transferred the shares to the plaintiff, for the purpose of de-

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laying the just claims of the bank, and that the plaintiff was a mere trustee; (paras. 5 and 6) that Dávar, in the list of his property given to his creditors, had set down 427 shares of the bank; and that, pursuant to the power given by Clause 19 of the Deed of Settlement, and the notice printed at foot of the second issue of shares, the bank was entitled to retain these shares.

The suit was heard before ARNOULD, J., on the 6th of August 1866.

Scoble and *Green* for the plaintiff.

Pigot and *Ferguson* for the defendants.

The following issues were framed: (1) whether the allegations in the 4th para. of the written statement, or either or any of them, is true; (2) whether, if true, they constitute any defence to the suit; (3) whether, at the time of the transfer of the said shares to the plaintiff, N. A. Dávar was indebted to the bank; (4) whether the bank was entitled to retain the said shares.

Pigot:—Since the written statement was filed, a meeting of the bank has been held, at which a report of the directors was read, in which (amongst other things) it was stated that one-fourth of the capital actually paid up had been lost. By Clause 198 of the Deed of Settlement, dated 19th November 1860, it is declared that "if, and when, it shall appear upon, or be certified by, any report of the auditors, or any report of the directors, that one-fourth of the capital actually paid up has been lost, in the course of business or otherwise, then, and in such case, the company shall thereupon be *ipso facto* dissolved."

Further issues: (5) whether by reason of its appearing in a report of the directors, read at a meeting of the bank on the 12th of July last, that one-fourth of the paid-up capital of the bank had then been lost, the company was not thereupon, under Clause 198 of the Deed of Settlement, *ipso facto* dissolved; (6) whether the suit can be further maintained, either as against the company, or as against the defendants personally.

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Green :—Under Sec. II. of Act XIX. of 1857, the carrying on business by a company without registration is prohibited, and, as its consequence, members of such a company are severally liable, and may be sued without joining the other members. It may indeed be said that the carrying on of business by such a company is illegal. [ARNOULD, J. :—Then how can you ask the court to compel an illegal company to transfer shares, which, as part of their business, is against the prohibition of the Act? Besides, the maxim *in pari delicto melior est conditio possidentis* applies; the plaintiff being, as registered shareholder, a member of an illegal company.] He does not sue the company; but certain persons, who, under the Deed of Settlement, represent the company, and are primarily liable, with a power to indemnify themselves against the partnership; and that liability does not cease by any *ipso facto* or other dissolution of the so-called company.

Pigot, contra :—If the defendants are sued as personally liable, the plaintiff, as a registered shareholder, and therefore a partner, cannot proceed in this form of suit.

ARNOULD, J., gave judgment for the defendants, in whose favour he found on the 5th and 6th issues.

Nov. 16. Appeal No. 75.

The appeal came on for hearing this day before COUCH, C.J., and SARGENT, J.

Green, for the appellant, contended that giving a certificate for shares in the company would not be carrying on trade or business with gain for its object, within the meaning of Sec. II. of Act XIX. of 1857. The plaintiff merely asked for *indicia* of proof that he was a member of the company; and the defendants by giving such would not be furthering any illegal object. The following cases were cited :—*Sharpe* v. *Taylor* (*a*), *Butt* v. *Monteaux* (*b*), *Shepherd* v. *Oxenford* (*c*) *Greenham* v. *Gray* (*d*).

Pigot, contrâ :—In the cases cited the object sought was the preservation of property, which a court of equity always looks to. Here the plaintiff asks for a certificate, in order

(*a*) 2 Phillips 801. (*b*) 1 K. & J. 98. (*c*) Ibid. 491. (*d*) Ir. Com. L. Rep. 501

1866. Nov. 16. Appeal No. 75.

to establish his claim in some other proceeding. The only claim against the directors is on the ground of their duty under the Deed of Settlement, and their acting in the way required by the plaintiff would be carrying on business, which is prohibited by the Act. The plaintiff cannot sue his copartners in damages for not performing their duties as partners. He may sue them for an account, and to have his share ascertained.

COUCH, C.J.:—In this case I consider that the learned Judge, in finding the 6th issue for the defendants, found that the suit could not be maintained, in consequence of the illegality of the company.

Act XIX. of 1857 (with which Act VII. of 1860, relating to joint stock banking companies, is incorporated by Sec. XI. of that Act), after declaring that it is expedient that the law relating to the incorporation and regulation of joint stock companies and other associations should be amended and that their members should be enabled to limit their liabilities for the debts and engagements thereof, proceeds to enact by Sec. I. that "Seven or more persons associated for any lawful purpose may, by subscribing their names to a Memorandum of Association, and otherwise complying with the requisitions of this Act in respect of registration, form themselves into an incorporated Company, with or without limited liability." And by Sec. II. that "Not more than twenty persons shall, after the first day of January 1858, carry on in partnership, in any part of the territories in the possession and under the government of the East India Company, any trade or business having gain for its object, unless they are registered as a Company under this Act, or are authorised so to carry on business by an Act of Parliament, or by Royal Charter or Letters Patent, or by an Act of the Governor General of India in Council."

Now, the Deed of Settlement of this Company recites that the several parties thereto have agreed to raise among themselves a certain amount of capital, to enable them to carry on the business of banking upon the terms and conditions, and under and subject to the several provisions and regulations

thereinafter contained; thereby giving to the company all the qualities and attributes of a company registered under the Act. 1866. Nov. 16. Appeal No. 75.

When the plaint was filed this company was neither incorporated nor registered; and the plaintiff brings the suit to compel the defendants to deliver up to him certificates of shares in this illegal company, or to pay to him by way of damages Rs. 90,524.

If we were to hold that the plaintiff was entitled to the relief which he seeks, we should be giving to a company not registered under the Act, and prohibited by it from carrying on business, the privileges which a legally constituted company would have.

I am, therefore, of opinion that the judgment of the court below should be affirmed. If the plaintiff has acquired any right to sue as partner, he may do so.

SARGENT, J.:—I quite concur.

Decree affirmed.

Attorneys for appellant: *Dallas, Lynch, and Langdale.*

Attorneys for respondents: *Keir, Ramsden, and Prescot.*

Original Suit No. 35 *of* 1865; *Appeal No.* 83.

PI'RBHA'I RA'VJI and another. ..*Plaintiffs and Appellants.*
NENBA'I, widow .....*Defendant and Respondent.*

Limitation, defence of—Waiver—Accounts—Commissioner—Order of Reference—Amendment.

In a suit for an account where the defendant, while alleging the balance to be in her favour, contended that the plaintiff's claim was barred by the Limitation Act; and the accounts were afterwards referred by consent to the Commissioner, who refused, without special direction, to notice the defence of limitation; and the Judge of the Division Court amended the order of reference, by directing the Commissioner to investigate the accounts with reference to the operation of the Act:—

Held, **on appeal (*by Couch, C.J., and Westropp, J.*), that the order of amendment was justified by the circumstances of the case; and that the defendant having raised the defence of limitation, and not having subsequently abandoned it, that question should be first decided.**

1867. February 21. Appeal No. 83.

APPEAL from an order of Sir Joseph ARNOULD. J.

The original suit was for an account of partnership dealings between the legal representatives of deceased partners.

On application under Sec. 119 of Act VIII. of 1859, a judgment passed *ex parte* in this case, on the 24th of July 1865, was set aside, on the 9th of September following. The defendant subsequently filed a written statement, in which, while alleging the balance of account to be in her favour, she says that she will, if necessary, contend that the plaintiffs' claim is barred by Act XIV. of 1859.

On the 30th of November 1865, the Suit came on for hearing before Mr. Justice ANSTEY, when the plaint was amended, by consent, so as to include a cross claim by the defendant; and by consent all the accounts were referred to the Commissioner, under Sec. 181 of the Code.

Howard, on the 18th of August 1866, before ARNOULD, J., moved for an order to suspend the reference to the Commissioner, until after the trial of a special issue, as to whether all the items in the account, with which the plaintiffs seek to charge the defendant, were not barred by Act XIV. of 1859; and a *Rule Nisi* was granted.

The Advocate General and *Green,* on the 20th of September following, appeared to show cause; and contended that what

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was done when the case was referred by consent to the Commissioner, amounted to a waiver of the objection of limitation.

Howard, in support of the Rule:—There was no abandonment of the defence of limitation raised in the written statement. The Commissioner ought to take notice of that defence without special direction; and it is only because he refused to do so, that we have made this application.

PER CURIAM:—*Rule Nisi* discharged with costs: And in lieu thereof the Court orders, that there be inserted in the order of reference, by way of amendment, a direction to the Commissioner, to investigate the accounts referred to him, with reference to the operation of the Limitation Act; and that he do dispose of the question so arising, at the earliest possible stage in the course of his investigation of the accounts.

The Appeal was argued, on the 21st of February 1867, before COUCH, C.J., and WESTROPP, J.

The Advocate General (*the Honourable L. H. Bayley*), for the appellant, contended that the amendment of the order was not warranted by Sec. 181 of the Code, which contemplated a reference once for all. If the whole of the plaintiffs' claim was barred by the Law of Limitation, the consenting to an account was unnecessary. There was an implied waiver of the defence of limitation, by consenting to the reference.

Green, on the same side:—The Law of Limitation was abandoned by both parties. The defendant, in her written statement, asked for an account of dealings and transactions which ended on the 12th of October 1855. The reference of the accounts to the Commissioner was in the nature of a compromise; and the plaint was amended as part of the arrangement. The defendant now insists on the defence of the statute, as going to the root of the whole claim; and it is sufficient for us to say, that such an allegation is inconsistent with her consent to the reference. It was clearly the intention of the defendant then to obtain the plaintiffs' consent to go into the entire account of the mutual dealings; and the Court will not now allow her to change her

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mind. A party by consenting to an account admits that he is an accounting party. Had the objection of limitation been expressly withdrawn, there would have been no doubt in the case. There was, however, clearly an implied waiver; and, as the practice here was not settled, the plaintiffs should not be prejudiced by following a settled practice in England. That practice is, that a special exception should be introduced into a decree for an account, if the defence of the statute is intended to be relied upon.

Howard, for the respondent:—It is clear that the plaintiffs cannot be damnified if this appeal be dismissed. The decree says that the Commissioner is to report whether anything is "due." That must mean *legally* due; and the Commissioner is bound to notice the defence of limitation: *Sáluji Kesráji* v. *Rájsangji Jálamsangji*. (*a*) It does not follow that consenting to refer an account, all the items of which were *primâ facie* barred, was a consent to waive the defence of limitation. There was no direction in the decree excluding the defence. There was no counter claim set up in the written statement independently of the transactions alleged in the plaint.

McCulloch, on the same side:—I did not understand that there was any waiver of the defence of limitation, in consenting to have the accounts referred to the Commissioner.

Cur. adv. vult.

April 8.

COUCH, C.J.:—There can be no doubt that the defendant, in her written statement, set up the defence of limitation as a preliminary objection, before asking for an account; and that question should have been settled first.

But the parties by consent agreed to a reference; and it is contended that the defendant thereby waived the defence of limitation; and, therefore, that the learned Judge was wrong in holding that he was bound to give effect to that defence, by amending the order of reference, as he did, on the 20th of September 1866.

(*a* 2 Bom. H. C. Rep. 169.

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We think, the defendant having raised the defence in her written statement, it should be clearly made out that she subsequently intended to abandon it.

The defendant obtained no advantage by the amendment of the plaint, so as to meet the written statement. There was, therefore, no consideration for waiving the defence of the Law of Limitation. And Mr. McCulloch says that he did not at the time understand that he was waiving it.

We think that the order made by the learned Judge was a proper one, and justified by the circumstances of the case; and we therefore affirm it, but without costs.

WESTROPP, J., concurred.

Order affirmed.

Attorney for appellants: *C. Leggett.*

Attorneys for respondent: *Macfarlane and Green.*

In re MA'NEKJI FRA'MJI, an Insolvent.

Insolvent Court Rules—Fresh Petition—Practice.

Held **that Rule 14 of the Insolvent Court at Bombay,—requiring a special application, on affidavit, and notice to opposing creditors, before a fresh petition can be filed—has reference to a dismissal upon hearing; and not to the case of a petition dismissed under Rule 10.**

1867. April 4.

THIS was an appeal, by an opposing creditor, from an order made by the Commissioner in Insolvency, on the 7th of January 1867, by which the petition of the Insolvent was dismissed, under Rule 10 of the Court, as the schedule had not been filed within thirty days after the filing of the petition (*a*); but leave was at the same time granted to file a fresh petition.

Dunbar, for the appellant, contended that the Commissioner had no right to allow the insolvent to file a fresh petition, without a special application to the court having been made,

(*a*) RULE 10:—"In every case where the schedule shall not be filed within thirty days after the filing of the petition by a party not in custody, such petition shall be dismissed."

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and notice served on the opposing creditors, as provided for by Rule 14. (*b*)

Marriott (*Green* with him), for the respondent, the insolvent, argued that this was not a case contemplated by Rule 14. It was not by reason of there being an opposing creditor that the petition in this case had been dismissed, but because Rule 10 required that "such petition *shall* be dismissed." But it was also the practice of the court in such case to allow a fresh petition to be filed without a special application.

COUCH, C.J. :—We think that Rule 14—which follows the rules having reference to the hearing of the petition—was not intended to apply to the case of a petition being dismissed under Rule 10, by reason of the schedule not having been filed; but that it refers to a dismissal upon the hearing of a petition.

ARNOULD, J., concurred.

Appeal dismissed.

(*b*) RULE 14 :—"No insolvent who has had his petition dismissed shall be allowed to file a fresh petition without a special application to the Court, on affidavit, stating the cause of dismissal, and the grounds of such new application, which affidavit shall be served on the opposing creditors four clear days before the application to the Court is made."

CASES

DECIDED IN THE

APPELLATE CIVIL JURISDICTION

OF THE

HIGH COURT OF BOMBAY.

Special Appeal No. 69 *of* 1866.

DWA'RKA'DA'S LALUBHAI' .....*Appellant.*
A'DA'M A'LI SULTA'N A'LI .....*Respondent.*

Marine Insurance—Constructive total loss—Remand.

In a suit on a policy of insurance, as for a total loss, where goods were shipped for the voyage from Súrat to Karáchí, and the vessel, having sprung a leak, was forced to put into Dwárká, at which place the goods (with the exception of some iron thrown overboard during the voyage) were landed and placed in a warehouse, from which a portion (some castor oil and jágarí) was carried off by robbers; and the larger residue of the cargo—consisting principally of cotton seeds, which were dried and cleaned—was sold; and the proceeds, after deducting freight expenses, remained in the hands of the Mahájans of Beyt, to be paid to whomsoever might be entitled to them:—

Held: 1*st*.—That the loss by robbers, although not expressly mentioned in the policy, was one of the perils insured against.

2*nd*.—That the judge below, being erroneously of opinion that, when the goods were once landed damaged, there was nothing to do but to sell everything for the benefit of the underwriters, and having consequently recorded no finding on the material question, whether the whole or any part of the cargo was practically capable of being sent in a marketable state to the port of destination;—the suit must be remanded in order that the judge may determine, whether there was a constructive total loss, which entitled the plaintiffs to abandon, and, if not, that he may award such a proportion of the value of the iron and of the jágarí and oil which were actually lost, and of the amount of the deterioration in the cotton seeds and other articles, as the sum insured by the defendant bore to the whole sum insured, taking into account, also, in that case what proportion the sum insured bore to the actual value of the goods.

The High Court is not at liberty in a special appeal to draw any inference of fact from the evidence in the case.

1866. August 22. S. A. No. 69 of 1866.

THIS was a special appeal from the decision of C. H. Cameron, District Judge of Súrat, in Appeal Suit No. 156 of 1865, reversing the decree of the Munsif of Súrat, in Original Suit No. 580 of 1865.

The case was argued before COUCH, C. J., and NEWTON, J.

Howard and *Dhirajlál Mathurádás* for the appellant.

Reid and *Shántárám Náráyan* for the respondent.

The facts sufficiently appear in the judgment.

Cur. adv. vult.

September 27. COUCH, C. J.—This was a suit on a policy of insurance on goods shipped on board a native vessel called *Hariprasád*, for the voyage from Súrat to Karáchí. The plaintiffs, the special respondents, claimed Rs. 897 with interest, as for a total loss.

The defendant, by his answer, admitted the policy; but insisted that the goods insured had been safely landed at Dwárká, and, therefore, he was not liable.

The Munsif rejected the claim, on the ground that the plaintiffs had not shown that the whole, or any specific portion, of the goods were lost, so as to charge the insurers.

On appeal, the District Judge reversed this decree, and awarded to the plaintiffs the full amount claimed with interest.

The facts of the case appear to have been that the vessel, after leaving Súrat with the goods on board, met with bad weather, and, having sprung a leak, was forced to put into Dwárká harbour. The goods insured consisted principally of cotton seeds of the value, as stated in the manifest, of Rs. 1,318-12. There were also jágarí, valued at Rs. 180; castor oil, valued at Rs. 130; iron, valued at Rs. 335; and some other articles of small value. The iron was thrown overboard during the voyage; and on the arrival of the vessel at Dwárká the remaining goods were landed, and placed in a godown, which was shortly afterwards plundered by the Wághírs, and the jágarí and oil were carried off by them. The cotton seeds, after being dried and cleaned,

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were sold with the other articles of small value; and the proceeds, after deducting the freight and expenses, remained in the hands of the Mahájans at Beyt, to be paid to whomsoever might be entitled to them.

The District Judge has based his judgment upon his opinion, that the agreement was, that if the goods did not arrive safely at Karáchí, the insurer would be answerable for the loss, that the goods had not reached Karáchí safely, and, therefore, the defendant was liable; but it is to be remarked that he does not show an accurate appreciation of the evidence, when he says that most of the goods were thrown overboard. He appears to have thought that the whole loss, including the plundering by the Wághírs, was occasioned by perils of the seas.

Now, there was no actual total loss of the goods insured, as a large portion of them was landed at Dwárká, and, supposing the robbery by the Wághírs to be a loss occasioned by perils of the seas, still the cotton seeds, which formed the more valuable portion of the cargo, remained. We think the robbery by the Wághírs was a loss, not strictly by perils of the seas, but by one of the perils insured against. The rule *causa proxima non remota spectatur* is not opposed to this. Although not expressly mentioned in the policy, a loss by robbers must be considered as amongst the perils insured against. It became necessary to land the goods at Dwárká, and (if they were not then in such a state that there was a constructive total loss) to keep them there, until they could be forwarded in the same vessel after it had been repaired, or in another vessel, to the port of destination; and we think they must be considered during that period to be protected by the policy as if they were still on board the vessel, and a loss of them by robbery is within the perils insured against. This view is supported by the judgment of Lord *Mansfield* in *Pelly* v. *Royal Exchange Assurance Company* (*a*).

In order to arrive at a right conclusion in this case, it was necessary for the Judge in the court below to consider,

(*a*) 1 Burr. 342.

1866. September 27. S. A. No. 69 of 1866.

whether on the arrival of the vessel at Dwárká when that part only of the cargo which consisted of iron had been actually lost, or after the robbery by the Wághírs when another portion was actually lost, there was a constructive total loss of the goods insured, which entitled the plaintiffs to abandon.

The principle upon which he should have proceeded is stated in the following passage in Sir *Joseph Arnould's* work on Marine Insurance, Sec. 399—"Where the original ship is disabled in the course of the voyage, and no other can be procured at the port of the casualty or any neighbouring port, the master has a right, where the cargo is of a perishable nature and sea-damaged, to sell it at such port for the benefit of all concerned, and the assured on goods in like case may abandon, and recover as for a total loss. Where, however, the original ship can be repaired with any prospect of sending on the cargo, or what remains of it, in a marketable state to its port of destination, or where another ship can be procured, either at the same or a contiguous port, without any very extraordinary delay or sacrifice, the master is, at all events, empowered, if not bound, to send it on; and he certainly has no right in such cases to sell, nor can the assured on goods abandon and recover as for a total loss." And Chief Justice *Jervis*, in delivering the judgment of the Court of Common Pleas in England in *Rosetto* v. *Gurney* (*b*) says:—"As a general rule, where the whole or any part of a cargo is practically capable of being sent in a marketable state to its port of destination, the master cannot sell, nor can the assured recover as for a total loss. Whether the cargo can practically be forwarded to its port of destination, involves a consideration of all the circumstances of each particular case; and this word 'practically,' as explained by my brother *Maule* in *Moss* v. *Smith* (*c*), comprehends the condition upon which the difference between a total and partial loss depends. 'In matters of business,' says that learned Judge, 'a thing is commonly treated as impossible when it is impracticable, and as impracticable, when it cannot be done

(*b*) 11 C. B. 186. (*c*) 9 C. B. 103.

1866. September 27. S. A. No. 69. of 1866.

without laying out more money than the thing is worth.' Thus, if goods are reduced to such a state by sea-damage as to be worth nothing if sent on, the master may sell them, and the owner may recover as for a constructive total loss: *Parry* v. *Aberdien* (*d*). So if, from sea-damage, the goods cease to retain their original character, for instance, from the progress of putrefaction, the master is justified in selling, and the assured may recover a total loss: *Roux* v. *Salvador* (*e*). On the other hand, if the damage is repairable, the loss is total or partial, according to circumstances. If the damage cannot be repaired without laying out more money than the thing is worth, the reparation is impracticable, and, therefore, as between the underwriters and the assured, impossible. If it can, the cargo is then practically capable of being sent in a marketable state to its port of destination, the master cannot sell it, and the assured cannot recover as for a constructive total loss. And the same rule applies if a part only of the cargo can be saved."

If the facts found by the District Judge had been sufficient to enable us to apply this principle to the case, we might ourselves have disposed of the suit, and have either confirmed the decree of the lower court, or modified it by awarding to the plaintiff what he would be entitled to as for a partial loss; but the Judge has acted upon the erroneous opinion, expressed in his judgment, that when the goods were once landed damaged, there was nothing to do but to sell everything for the benefit of the underwriters, and has not recorded any finding upon this material part of the case.

This court is not at liberty, on a special appeal, to draw any inferences of fact from the evidence in the case; and we must, therefore, remand the suit for re-trial, in order that the court below may determine, whether there was a constructive total loss, according to the rule which we have pointed out; and the court will receive any additional evidence which may be necessary for the determination of this question. If it should find that there was a constructive

(*d*) 9 B. & C. 416. (*e*) 4 Sc. 34.

1866. September 27. S. A. No. 69 of 1866.

total loss, the plaintiff will be entitled to recover the amount claimed with interest; but if not, then such a proportion of the value of the iron and jágarí and oil which were actually lost, and of the amount of the deterioration suffered by the cotton seeds and other articles, as the sum insured by the defendant bears to the whole sum insured, should be awarded to the plaintiff with interest thereon. And, in estimating the value of the goods lost, and the amount of the deterioration which the underwriters are to be charged with, the court must consider what proportion the sum insured bore to the actual value of the goods; and, if it was less than the actual value, should allow for the loss and deterioration in the same proportion. And the costs of this appeal will abide the final decision.

Decree reversed and suit remanded.

Special Appeal No. 540 *of* 1865.

NAROTTAM JAGJI'VAN..... *Appellant.*
NARSANDA'S HA'RIKISANDA'S..... *Respondent.*

Hindú Law—Testamentary Power—Separate Property.

The title of a remote kinsman, though heir of a Hindú testator, who died without leaving issue, or any near relative surviving him, and with whom that remote kinsman had not been united in food, worship, or estate, cannot prevail against the title of a devisee of the property of that testator, whether such property was, by the testator, self-acquired, or held in severalty, either by virtue of a partition, or of the non-existence, or, if any ever did exist, the extinction of coparceners.

1866. October 13. S. A. No. 540 of 1865.

THIS was a special appeal from the decision of C. H. Cameron, District Judge of Súrat, in Appeal Suit No. 65 of 1865, reversing the decree of the Munsif of Surat, in Original Suit No. 1304 of 1864.

The case was argued before WESTROPP and GIBBS, J J., by *Nánábhái Haridás* on behalf of the appellant.

There was no appearance on behalf of the respondent.

Cur. adv. vult.

1866.
October 18.
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of 1865.

WESTROPP, J.—This is a contest between the heir and the devisee of a deceased Hindú.

Vandrávandás Nathubhái made his will, bearing date the 23rd of February 1862, as follows:—

"The 9th of Mahá vad of Samvat 1918, Sunday, the 23rd of February 1862. To Khamár Narottam Jagjívan bin Raghunáth, inhabitant (of Súrat) Nâusárí gate. Written by Khamár Vandrávandás Nathubhái bin Nágardás, carrying on no trade at present, aged about 91 years, inhabitant (of Súrat) near the Nâusárí gate. To wit: I am alone. I am very old. I have been ill for some time, and I am now not certain of my life. And you have been taking care of me for seven years. And I have got no near relative. And you are like my son. And I lodge in your house. And you provide me my maintenance in every way. And I have in all property worth Rs. 300, including cash and jewels. The same I have this day given to you. And if I require anything for charitable purposes, during my life-time, I am to take the same from you out of it. And if I die then you are duly to perform my funeral ceremonies for a year, according to the custom of our caste, from the balance that may remain, after deducting what I may have taken from you from the said Rs. 300. Should any further balance remain, you are the owner thereof. No person has any thing to do with it. Because you take care of me, and provide me my maintenance, and you are like my son, I have given this writing to you. The same is agreed and consented to by me."

The will was duly signed and attested.

The respondent Narsandás obtained a certificate of heirship to Vandrávandás, the testator, of whom he was a remote kinsman on the paternal side. The testator died without leaving any issue or near relative surviving him. He had lived for several years preceding his death with and he died in the house of, the appellant, the devisee, who performed the funeral ceremonies of the testator.

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The plaintiff (respondent) brought the present action against the appellant (defendant), to recover from him the property of the testator. The defendant relied upon the will; and the Munsif of Súrat decreed in his favour.

The plaintiff appealed to the District Judge of Súrat, Mr. Cameron, who, on the 30th of August 1865, reversed the decree of the Munsif with costs; and held the plaintiff, as heir, entitled to the property of the deceased.

The defendant has specially appealed against that decision to this court. The points of appeal are as follows:—

"That the District Judge was wrong in holding that, without any independent inquiry in this case, the plaintiff must be considered Vandrávandás's heir, because he held a certificate to that effect, granted to him after a summary inquiry into his claims; (2) that he was wrong in holding that the will, relied upon by the defendant, was contrary to Hindú Law, and therefore useless; (3) that he was wrong in holding that a Hindú cannot make a will, except with regard to self-acquired property; and that, with regard to all other property he may possess, he is merely a tenant for life."

The testator never was united in family with his remote kinsman, the plaintiff; nor did the latter ever assert that they had lived together, or been united, either in food, worship, or estate. He rested his claim simply on the supposed invalidity of the will, and on his being next male heir of the deceased.

The District Judge seems to have held the will to be invalid on two grounds: (1) because there was nothing to show that the property of the deceased was self-acquired; (2) that, even if it were, he being a Hindú, could not dispose of it by will.

In the Supreme Court the wills of Hindús have been always recognized, and also in the High Court, at the Original Side. Whatever questions there may formerly have been as to the right of a Hindú to make a will relating to

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his property in the Mofussil, or as to the recognition of wills by the Hindú law, there can be no doubt that testamentary writings are, as returns made within the last few years from the zillahs show, made in all parts of the Mofussil of this Presidency; but, as might have been expected, much more frequently in some districts than in others, and this court at its Appellate Side has, on several occasions, recognised and acted upon such documents. That Hindús may make wills, and such wills may be admitted to proof, is contemplated by Sections 1 and 13 of Act XXVII. of 1860, an enactment which more especially concerns the Mofussil. The testamentary power of Hindús is by Lord *Kingsdown* in 9 Moore's Ind. App. p. 121, and by *Knight Bruce*, L.J., *Ibid.* p. 135, treated as completely established. It is, therefore, now too late to deny to Hindús in the Mofussil of this Presidency the right to make wills, as the District Judge has done in the present case.

But the extent to which such testaments shall be permitted to take effect—the scope of the testamentary power of a Hindú—is quite another question. Even in the Supreme Court, where the right of a Hindú to make a will has been always recognised, I have never known it to be argued or held, that his testamentary power is co-extensive with that of an Englishman. The will of a Hindú, it has been decided by the Privy Council, must be regulated by the Hindú Law (*a*). It has been often ruled in the Supreme Court, that he may dispose, by will, of property wholly acquired by his own exertions, and also of separate property acquired by partition of family property, or by the non-existence, or, if any did ever exist, the extinction of co-parceners, (if the members of an undivided Hindú family may be so designated,) or joint tenants; and no distinction, of which I am aware, has ever been there taken between it and self-acquired property, either in point of descent or of alienability. On the other hand, it has been often held there, also, that he cannot dispose, *by will*, of undivided family property, or of any share therein, so long as that share remains uncovered from the family stock.

(*a*) See 8 Moore's Ind. App. 66.

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The District Judge has held, that, as the property, now sued for, has not been proved to be self-acquired property, even if the testator might have made a will, he could not, by it, have disposed of that property. However, it being undeniable that the testator was separate in food, worship and estate from the plaintiff; and there not being any reason for supposing that the testator was, at the time of his death, a member of an undivided family, or, in fact, that he had any descendant or near relative; his property,—even though it may possibly have been ancestral, or originally derived from a general fund, enjoyed by him jointly with members of his family since deceased without issue,—was at the time of his death, to all intents and purposes, separate property. The plaintiff, therefore, could not take by right of survivorship as a joint tenant or member of an undivided family.

The law of descent of separate property obtained on partition, and of self-acquired property, is the same. *Katama Natchier* v. *the Rajah of Shivagunga* (*b*). It is difficult to assign any sufficient reason why the power of disposition by will should not exist with regard to the former as well as the latter. Neither the Supreme Court nor this court at its Original Side has made any such distinction; and, without some strong authority, we see no reason why, with regard to Mofussil wills, we should do so.

In a case from Madras, *Nagalutchmee Ummal* v. *Gopoo Nadaraja Chetty* (*c*), a will by a Hindú, without male issue, kinsman, or coparcener, but leaving a wife and daughters, was held good, as well as to ancestral as to self-acquired property. There cannot be any doubt that an alienation *inter vivos* by the testator, in the present case, of his property would have been good against the plaintiff. *Vallinâya-gâm Pillâi* v. *Pachché* (*d*) is a clear authority that in Madras at all events, the testamentary power of a Hindú is co-extensive with his independent right of alienation *inter vivos*,

(*b*) 9 Moore's Ind. App. 539, 609, 610. See *Timmi Reddy* v *Achamma*, 2 Mad. H. C. Rep. 325.

(*c*) 6 Moore's Ind. App. 309. (*d*) 1 Mad. H. C. Rep. 326.

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and we are unable to suggest any good reason, why the law in the Mofussil of this Presidency should be held to be different.

For these reasons we think that the decree of the District Judge should be reversed; and that the respondent should pay all costs of this appeal and of the suit in the courts below, and that, if the property were made over to the respondent, he should forthwith return it, or refund its value to the appellant.

GIBBS, J., concurred.

Appeal allowed.

Special Appeal, No. 530 *of* 1865.

KEDA'RI' bin RA'NU and BHAI'RU' bin JA'NKU' ..... *Appellants.*

A'TMA'RA'MBHAT bin NA'RA'YA'NBHAT and HARI' SADA'SHIV ..... *Respondents.*

Mortgage—Oppressive conditions of deed set aside—Directions as to account to be taken—Inadequacy of consideration.

Where money-lenders, dealing with ignorant, illiterate peasants, made use of the necessities of the position of those peasants, who were seeking to raise a sum of money for the purpose of stocking and tilling their lands, to impose upon them a contract, in the form of a mortgage, by which they agreed, in default of punctuality of payment of the half produce, and in other events, to sell their land at a gross undervalue, viz. one-third of the amount of the mortgage debt, which in itself was not more than equal to half the value of the annual produce of the land, and to remain liable to the remaining two-thirds of that debt with interest; and, even if no default should occur on their parts in payment of a moiety of the annual produce, or the performance of their other covenants, and notwithstanding full payment of the principal, to continue for fifteen years to pay the half produce of the lands to the mortgagees:—

Held (reversing the decrees of both the courts below) that the deed of mortgage should only stand as security for the payment of the principal sum of Rs. 300 and interest at nine per cent.; and in all other respects should be set aside as inequitable, fraudulent, and grossly oppressive.

Held, also, that if, in execution of the reversed decrees, the lands had been made over to the mortgagees as purchasers, they should be restored to the mortgagors, and that the rents, profits and produce, received by

the mortgagees while in possession, should be set off on account against the said principal sum and interest, and that the balance should be paid by the party against whom the same might be found.

Mere inadequacy of consideration, unless it be so great as to amount to evidence of fraud, is not sufficient ground for setting aside a contract, or refusing to decree specific performance of it. But inadequacy of consideration, when found in conjunction with any such other circumstances as suppression of true value of property, misrepresentation, fraud, surprise, oppression, urgent necessity for money, weakness of understanding or even ignorance, is an ingredient which weighs powerfully with a Court of Equity in considering whether it should set aside contracts, or refuse to decree specific performance of them.

As to the validity of a mortgage of future crops—*Quære.*

1866.
August 13.
S. A. No. 530 of 1865.

THIS was a special appeal from the decision of R. F. Mactier, District Judge of Sátárá, in Appeal Suit No. 563 of 1864, affirming the decree of the Munsif of Wái, in Original Suit No. 619 of 1864.

Báiravanáth Mangesh for the appellants.

Vishvanáth Náráyan Mandlik for the respondents.

The facts are fully stated in the Judgment.

Cur. adv. vult.

October 13.

WESTROPP, J.:—This suit was founded on a mortgage of certain fields in Wái Táluká, containing 36 acres and 19 guntas of good land, and 5 acres and 16 guntas of bad land, assessed at Rs. 35-8-0. The mortgage bore date as of the 10th Paush Shúddha, Shake 1784 (30th December 1862), and purported to be made by Mandú Jotí and Kedárí, sons of Ránú Jádhau, to the abovenamed respondents (plaintiffs), in consideration of Rs. 300, lent by the latter to the mortgagors. It stipulated that the mortgagors should, in lieu of interest, annually bring and deliver to the plaintiffs, at their house at Wái, a moiety of the whole produce of the land; that the principal sum of Rs. 300 should be repaid by instalments of Rs. 20 each, paid annually before the end of Márgashirsh, and that, even should the whole or part of that principal be liquidated before the expiration of fifteen years from the commencement of the following Shake year 1785, the mortgagors should continue annually to deliver the moiety of the produce of the land to the mortgagees; and that, if the mortgagors did not, within four months from the date of the

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mortgage, cause the land to be transferred to the names of the mortgagees in the Government revenue books, the land "shall be sold to you (the mortgagees) for Rs. 100; you are to enjoy it as you please, and the balance, Rs. 200, with interest, shall be paid on demand after one year in full, without making any excuse whatever as to future instalments which shall fall due." In the event of any default occurring in the annual delivery to the mortgagees of the moiety of the produce, the mortgage provided that, "we (the mortgagors) will pay any amount of damages you (the mortgagees) may mention, or we will *continue* to deliver 300 rupees' worth of juvárí and bázarí at the rate of, &c., *and* 4,000 bundles of juvárí karbí per, &c., to be delivered every year." The reaping and thrashing of the crops are to be performed in the presence of an agent of the mortgagees. "It shall not be done in your absence; should it be done, or should the share (moiety of the produce) contracted for be not paid, then two khandís of juvárí and bázarí by bárolí (twelve páyalís) measure and 4,000 bundles of karbí are agreed to be brought and delivered to you at Wáí." If the transfer in the revenue book be not made within the four months, or the annual instalment of Rs. 20 paid before the end of Márgashirsh in every year, or the moiety of the produce not delivered in full every year, or the land left uncultivated, "then the aforesaid mortgaged land is considered to be sold to you for Rs. 100. We shall make no claim of inheritance thereto, and the balance of rupees with interest we shall pay personally." Then followed a repetition of the fifteen years' clause, and then the mortgage proceeded thus:—"Even if the produce received by you on account of the share (moiety of the produce) exceed double the amount of principal to any extent, still the share shall be paid without objection, and all the conditions will be fulfilled. Even if the amount of the instalments be received in advance, still the share shall be paid in full; no excuse whatever shall be made."

Bhaírú and Sadú, as sureties, bound themselves in the same document to be responsible for the debt, and mortgaged their three pieces of land (Nos. 70, 66, and 76) to secure it,

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and agreed that, in default of payment by the principal debtors or themselves, their said land should be considered as sold to the mortgagees, together with the land of the principal debtors, for Rs. 100. Bálú and Nárú also joined in this document as sureties for the debt, and it then continued thus:—"We, all the debtors and the sureties, further give in writing that, besides the land we have mortgaged above, the houses and cattle belonging to all of us, and the bullocks and implements of husbandry, which we shall purchase with this money, together with the household furniture, shall be held as security for your money," &c. "We shall pay two annas a day as subsistence money to the sipáí who shall come to recover the same." The principal debtors and the sureties executed the mortgage as marksmen.

The mortgagees on the 26th of July 1864, filed their plaint, praying for a decree for the sum of Rs. 500 and costs, and that they should be declared purchasers of the mortgaged lands, as well of the principals as of the sureties, and for possession of the said lands and of the crops accordingly, and that the Rs. 500 should be paid out of the sale of the mortgaged houses, cattle, implements of agriculture and furniture.

The defendants denied the execution of the deed of mortgage sued upon, but admitted that they had executed another of a less oppressive character, by which they had agreed to give certain portions of the produce of their land to the mortgagees; and said that they had tendered such produce, but the plaintiffs had refused to accept it.

The Munsif, by his decree of the 7th of December 1864, held the mortgage sued upon to be proved, and that the defendants had received the Rs. 300. He declared that default having been made by the principal debtors in carrying out its provisions, the plaintiffs had become entitled to the mortgaged land of the principal debtors as purchasers; and he accordingly ordered it to be made over to them at a valuation of Rs. 100. He ordered the principal debtors, or, in their default, the sureties, to pay to the plaintiffs Rs. 200,

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the balance of the original debt, and, as arrears of interest, two khandís of juvári, or Rs. 240, and 4,000 bundles of straw, or Rs. 60. The Munsif refused to grant relief to the plaintiffs against the mortgaged property of the sureties, on the ground that the mortgage was not sufficiently specific, and was too vague with respect to it.

The defendants appealed to the District Judge, who, on the 17th of July 1865, affirmed the Munsif's decree with costs.

The defendants have specially appealed to this court, and set forth their grounds of appeal as follows:—

"(I.) That the decision of the District Judge is contrary to law in that (1) he has enforced an unreasonable and oppressive condition, against which Courts of Equity give relief; (2) he has enforced the penalty of forfeiture, inserted in the mortgage instrument merely as a threat to secure the payment of loan, interest, &c.; (3) he overlooked the important principle of law, that the respondents waived their right to the penalty of forfeiture, by getting the fields in dispute transferred to their names after default; (4) he has declared the mortgagees (respondents) absolute proprietors of the mortgaged fields, contrary to the recent decision of the High Court in Special Appeals Nos. 299 and 735 of 1864; (5) he has awarded interest exceeding the amount of the principal, which is contrary to Hindú law; (6) most of the penal clauses being vaguely worded, the mortgage instrument is void for confusion and uncertainty. (II.) That substantial errors in law, in the investigation of the case, have occurred, which have produced errors in the decision of the case upon its merits: (7) the District Judge has overlooked the strong presumption of fact—arising from the evidence adduced in this case and the wording of the bond—that the mortgage instrument was not read over, or that it was misread, to the illiterate appellants, either before or after their signing it; (8) he left a material question at issue undecided, viz., whether or not the contents of the bond are different from those agreed to by the appellants."

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The case was argued before my brother Tucker and myself on the 13th of August last by Mr. Bhárávanáth Mangesh for the appellants, and Mr. Vishvanáth Náráyaṇ Mandlik for the respondents.

We deferred our judgment in this and a similar case (No. 533 of 1865), in order that official translations of the mortgages should be carefully prepared, and that we might look into the authorities. I cannot say, however, that we had any doubt as to what our decree should be.

It was very candidly and properly admitted by Mr. Vishvanáth Náráyaṇ Mandlik, that, so far as the decrees of the Judge and Munsif in the present case declared the respondents to be the purchasers of the land, and awarded it to them for Rs. 100, those decrees could not stand. In that respect the case falls clearly within the principle which was adopted in this court in Special Appeal No. 299 of 1864 (*Rámji* v. *Chinto*) by Arnould, Newton, and Janárdan, JJ., and in *A'nandráv* v. *Rávji* (*a*) by Couch and Newton, JJ., and in other cases by my brother Tucker and myself (*b*), in accordance with *A'rumugam Mudali* v. *Ammí Ammál* (*c*) and *Nallana* v. *Palani* (*d*) by the High Court at Madras, following the well-known English rule, that no agreement in a mortgage can make it irredeemable, as laid down in *Howard* v. *Harris* (*e*), *Jennings* v. *Ward* (*f*), and many other cases. We are quite unable to concur with the District Judge in thinking that the stipulation in the mortgage, that Rs. 100, part of the debt, should be set aside as the purchase-money of the land, is such a peculiarity in this case as can take it out of that rule, which prevailed in Special Appeal No. 294 of 1864, to which he refers, and in the other cases which I have now mentioned. In fact, the mortgage in the present case is the most oppressive that we have ever seen, even in this country, and is far more so than were the mortgages in any of the cases which have been cited. Not only are the mortgagees, on any de-

(*a*) 2 Bom. H. C. Rep. 225. (*b*) See also 7 Moore's Ind. App. 323.
(*c*) 1 Mad. H. C. Rep. 400. (*d*) 2 Mad. H. C. Rep. 420.
(*e*) 1 Vernon, 190; 2 Tudor, L.C., 752.
(*f*) 2 Vernon, 520; 2 Tudor, L.C., 757.

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fault on the part of the mortgagors, to become the owners of the land, which was of very much greater value than the whole of the mortgage debt, but they are to become such owners at the price of one-third of that debt, and the unhappy mortgagors are to remain liable personally, and out of their houses, cattle, furniture, and implements of husbandry, to pay the balance of Rs. 200 with interest. Even if no default were made in payment of the substitute for interest, viz., a moiety of the produce of the land, (*which moiety, it appears, was annually equal to the whole amount of the principal,* and has actually been fixed at that rate in the decrees of the lower court), and if the principal were paid off at any time before the expiration of fifteen years commencing from the Shake year 1785, nevertheless the mortgagors were to continue, during the whole of those fifteen years, to make over the half produce of the land, *i. e.* 300 rupees' worth per annum, to the mortgagees. As a mortgage of future crops, that provision seems to bring the case within the principle of *Janardhun* v. *Madapa* (*g*) decided by the Ṣadr Adálat (after consulting their law officer) in 1853, where such a mortgage was held to be contrary to Hindú law, as being a mortgage of that which was not visible or in existence. [See, on this point, Drishtadi, Drishtabandhak, Wilson's Glossary, p. 148, and 1 Mad. H. C. Rep. 464, note; and as to the law of England—*Lunn* v. *Thornton*, 1 C. B. 379; *Gale* v. *Burnell*, 7 Q. B. 850; *Robinson* v. *Macdonell*, 5 M. & S. 228; *Wood & Forster's Case*, 1 Leonard 42; *Grantham* v. *Hewley*, Hobart 132; and as to Muhammadan law—Macnaghten, Chap. III. Sec. 14, p. 43; Chap. V. Sec. 5, p. 50, and Appendix pp. 204, 205, 208 n.; Elberling para. 336, p. 163; Baillie's Digest 519, 520; 2 Hedaya 372 et seq., 378; Baillie on Sale pp. 3, 141 et seq. See, however, as to Hindú law, Elberling p. 128, and Steele p. 261, and as to English law *Petch* v. *Tutin*, 15 M. & W. 110.] We do not consider it necessary to give any positive opinion as to the validity of that principle, or as to the validity of such a proviso as that, notwithstanding the Hindú law to the contrary, the

(*g*) Morris, Part III., p. 98.

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creditor shall be entitled to receive on any one occasion (*h*) an amount of interest exceeding the principal, or as to how far that proviso may be supported by Act XXVIII. of 1855. *Primâ facie*, and independently of legislation, it would appear to come rather within the maxim *pactis privatorum juri publico non derogatur*, as shown by the decisions in England on the laws against usury, than the maxim *modus et conventio vincunt legem*. Such an agreement, contained in a document executed A. D. 1803, was upheld, on the 8th of September 1855, by the Ṣadr Adálat in *Vishrám* v. *Bhimji* (*i*), a decision which seems open to much question, and to amount to this, that Hindús might, if they chose, set aside their own law of contract. Act XXVIII. of 1855 was passed on the 19th of September in that year, did not come into force until the 1st of January 1856, and did not affect contracts entered into previously to the passing of the Act (Sections 7 and 8).

We think that, sitting as a Court of Equity, it would be wholly improper for us to support, or carry into execution an instrument so utterly oppressive and inequitable as the deed of mortgage in the present case. Mere inadequacy of consideration, it is true, unless it be so great as to amount to evidence of fraud, is not sufficient ground for setting aside a contract, or refusing to decree a specific performance of it (*j*). In *Coles* v. *Trecothick* (*k*), Lord *Eldon* said:—"Unless the inadequacy of price is such as shocks the conscience, and amounts in itself to conclusive and decisive evidence of fraud in the transaction, it is not itself a sufficient ground for refusing a specific performance." Lord *Thurlow* in *Gwynne* v. *Heaton* (*l*) said:— "To set

(*h*) *Bhowanee* v. *Hussan Miya*, 1 Bom. H. C. Rep. 45; *Gholam Ahmed Khan* v. *Munohurdass*, 1 Macnaghten's S. D. A. Rep. 294. [And see post p. 23 et seq.—Ed.] (*i*) 2 Morris Bom. S. D. A. Ca. 279.

(*j*) *Low* v. *Barchard*, 8 Ves. 133; *Naylor* v. *Winch*, 1 Simon & Stuart 565; *Griffith* v. *Spratley*, 1 Cox 383; *Collier* v. *Brown*, *Ibid.* 428; *Abbott* v. *Sworder*, 4 De Gex. & Sm. 448. And see 10 Ves. 470, 209; 13 Ves. 103; 2 Hare 408; *Ibid.* 450; 2 Cox 320; 1 Kay & J. 571; 7 Ves. 30. But see *Day & Newman*, 2 Cox 77; 10 Ves. 300, 301.

(*k*) 9 Vesey 246. (*l*) 1 Bro. C.C. 1, 9.

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aside a conveyance there must be an inequality so strong, gross, and manifest that it must be impossible to state it to a man of common sense, without producing an exclamation at the inequality of it." And in *Heathcote* v. *Paignon* (*m*) he said:—"If mere inadequacy is the ground it should seem that it was scarcely sufficient. But there is a difference arising between that and evidence arising from inadequacy. If there is such inadequacy as to show that the person did not understand the bargain he made, or was so oppressed that he was glad to make it, knowing its inadequacy, it will show a command over him which may amount to fraud. If the transaction be such as marks over-reaching on one side, and imbecility on the other, it puts the parties in such a situation as to show that it could not have taken place without superior powers on the one side over the other." And Lord *Eldon*, in *Stilwell* v. *Wilkins*, said that, though in general a sale will not be set aside on the ground of inadequacy of price, "yet there may be cases of inadequacy so enormously great as to form a ground for cancelling the contract" (*n*).

Inadequacy of consideration, when found in conjunction with any other such circumstance as suppression of true value of property, misrepresentation, fraud, surprise, oppression, urgent necessity for money, weakness of understanding, or even ignorance, is an ingredient which weighs powerfully with a Court of Equity in considering whether it should set aside contracts, or refuse to decree specific performance of them. *Deane* v. *Rastron* (*o*), *Stilwell* v. *Wilkins* (*p*) [the case of a common sailor lately come ashore, and hard-pressed for money], *Heathcote* v. *Paignion* (*q*), *Lewis* v. *Lord Lechmere* (*r*), *Herne* v. *Meeres* (*s*), *Young* v. *Clarke* (*t*). In *Evans* v. *Llewellyn* (*u*) a deed was set aside as improvidently executed, it having been obtained for

(*m*) 2 Bro. C.C. 167, 175, and see per the Chief Baron in *Griffith* v. *Spratley*, 1 Cox 389, to the same effect. (*n*) Jacob R., 282.

(*o*) 1 Anstruther 64. (*p*) Jacob R. 280. (*q*) 2 Bro. C.C. 167.
(*r*) 10 Mod. Rep. 503. (*s*) 1 Vernon 465. (*t*) Prec. Ch. 538.
(*u*) 1 Cox. 333.

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an inadequate consideration from persons in low circumstances, and unapprised of their rights until the time of the transaction, though no misrepresentation or actual fraud appeared to have been made use of. Lord *Romilly*, M. R., in *Cockell* v. *Taylor* (*v*), set aside a sale of land to the plaintiff, where the consideration was about ten times the value of the land; the purchase having been made the condition of a loan which the plaintiff was very anxious to negotiate in order to prosecute his claim in Chancery to some valuable property, and he, though no imputation could be cast upon his mental capacity, being in humble circumstances and illiterate. "Coupled with such circumstances," the Master of the Rolls said (*w*), "the evidence of over-price is of great weight; and, if the case stood here, I should have been of opinion that this transaction was one which could not stand;" and again, "I am of opinion that this was a transaction, in which advantage was taken of the necessities of the plaintiff, and that, so far as regards the case subsisting between the plaintiff and the defendant Finch (the vendor), it is wholly void, and must be set aside, except so far as money may have been actually advanced to the plaintiff by Finch upon the security of the indenture of mortgage of December 1848." In *Baker* v. *Monk* (*x*), a sale for inadequate consideration, the vendor being an old woman in humble circumstances, and without any independent professional advice, was set aside.

We are not at all to be understood as laying down, as a general principle, that men, who are perfectly cognisant of what they are doing, are to be relieved from the consequences of any hard bargain into which they may willingly enter. But, in the present case, in which money-lenders, dealing with ignorant, illiterate peasants, unable even to sign their own names, have made use of the necessities of the position of those peasants, who were seeking to raise a sum of money for the purpose of stocking and tilling their lands, to impose

(*v*) 15 Beavan 103. The marginal note of that case is not very accurate. (*w*) Pp. 115, 116.

(*x*) 10 Jurist N. S. 624, affirmed on appeal, *Ibid.* 691.

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upon them a contract by which they agree, in default of punctuality of payment of the half produce, and in other events, to sell their land at a gross undervalue, viz. one-third of the amount of the debt, which in itself was not more than equal to half the value of the annual produce of the land, and to remain liable to the remaining two-thirds of the debt with interest; and, even if no default occur on their parts in payment of a moiety of the annual produce, or the performance of their other covenants, and notwithstanding full payment of the principal, to continue for fifteen years to pay the half produce of the lands to the mortgagees, we feel bound to treat such an instrument, containing such oppressive and unjustifiable provisions, as a fraud upon the mortgagors. We have a difficulty in understanding how any sane persons could have executed such a document, if they had been fully and fairly acquainted with its contents, and the consequences to which they exposed themselves by so doing. Even assuming, as we are bound to do, (the District Judge having so found it), that the deed of mortgage sued upon was the deed actually executed by them, the mere reading a deed to unprofessional persons, does not in all cases fix them with knowledge of its contents. *Hoghton* v. *Hoghton* (*y*). It should also be properly explained to them, if its provisions be complicated or very unusual.

We reverse the decrees of both of the lower courts; and order that the deed of mortgage of the 30th of December 1862 shall stand, as security for the payment, in the manner and to the extent hereinafter mentioned, of the principal sum of Rs. 300, and interest at nine per cent. per annum, and further order and decree that in all other respects the said deed of mortgage of the 30th December 1862 be, and it is hereby, set aside as inequitable, fraudulent, and grossly oppressive; and we direct that the lands, if they have been made over to the respondents, be forthwith restored to the mortgagors (the principal debtors), and that an account be taken by the court of first instance of the rents, profits and pro-

(*y*) 15 Beavan 279, 310.

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duce of the said lands whilst in the possession of the respondents, and received by them, or for their use, or by their order; making all due allowances in respect of Government revenue, or other expenses reasonably and properly incurred by them while in such possession; and we decree that the plaintiffs (respondents) are entitled to recover from the principal debtors the sum of Rs. 300 with simple interest at the ordinary rate of nine per cent. per annum, from the said 30th December 1862 until the taking of the accounts aforesaid; and we direct that the sum with which the plaintiffs shall be debited in such account as the value of the net rents, profits, and produce received by them, or for their use, or by their order, out of the said lands, shall be set off against the said sum of Rs. 300 with interest at such rate as aforesaid, and should such last mentioned sum of Rs. 300 and interest exceed the value of the said net produce, then that the said defendants (the principal debtors) shall pay the amount of such excess to the plaintiffs; and, in default of such payment by the principal debtors, that the said defendants, the sureties, shall pay the same to the plaintiffs; and that if the value of the said net produce shall exceed the said sum of Rs. 300 and interest as aforesaid, then that the plaintiffs (A'tmárámbhat and Sadáshivbhat) shall pay the amount of such excess to the defendants, the principal debtors. We direct that the parties respectively shall bear their own costs in the courts below, and that the special respondents do pay to the special appellants the costs of this special appeal.

TUCKER, J., concurred.

Appeal allowed.

NOTE.—The Court made a similar decree in Special Appeal No. 533 of 1865, in which there was a mortgage of equally oppressive character as that in the above case.—ED.

Referred Case.

KHUSHA'LCHAND LA'LCHAND *v.* IBRA'HIM FAKI'R.

Hindú Law—interest—Act XXVIII. *of* 1855.

By the Hindú Law interest exceeding in amount the principal sum cannot be recovered *at any one time.*

Act XXVIII. of 1855 has not, by repealing Sec. 12 of Reg. V. of 1827, or otherwise, altered this rule of the Hindú law.

1866. August 23. Referred Case.

CASE referred for the decision of the High Court, by C. G. Kemball, Acting Judge of the Súrat District, under Sec. 28 of Act XXIII. of 1861.

"An action was brought in the court of Mr. Mangeshráv Balvant, one of the Munsifs of Súrat, by one Hindú against another to recover the sum of Rs. 118-12; being Rs. 50, principal, with interest amounting to Rs. 68-12. The Munsif found, looking to the wording of the instrument on which the action was brought, and the facts in evidence, that the aggregate amount claimed was really due; but being of opinion that, under the provisions of the Hindú Law, it was not competent to him to allow interest in excess of the principal, he passed a decree in favor of the plaintiff for the sum of Rs. 50 principal *plus* Rs. 50 interest=Rs. 100.

"It must be mentioned that it was admitted in the course of the investigation that a sum of Rs. 44 had been repaid by the defendant to the plaintiff; and also that the instrument contained a clause to the effect that, in the event of interest being due, all instalments paid by the defendant should be applied, in the first instance, to wiping off the interest.

"Against the Munsif's decision the defendant appeals, on the ground that, as by the Hindú Law the creditor could only claim as interest a sum equal to the principal, so the Munsif ought to have deducted the Rs. 44, admitted to have been paid, from the Rs. 50 demandable by the law affecting

1866. August 23. Referred Case.

the litigants; and, therefore, should have passed a decree in favor of the plaintiff for the sum only of Rs. 56, viz. Rs. 50 principal *plus* Rs. 6 balance of interest. And the plaintiff took the opportunity, under Sec. 348 of the Civil Procedure Code, of objecting to the decision of the lower court, in so far as it rejected his claim to the full amount of interest found due.

"The points on which the opinion of the Honorable Judges is solicited are, 1st, whether, supposing the rule of Hindú Law regarding interest applicable, the Court is bound to take into consideration the whole sum received in liquidation of the interest, and to decree only the difference between the amount repaid and the sum of the principal; 2ndly, whether, in adjudicating between two Hindús, on a claim to interest which exceeds the amount of the principal, the Court is bound to have regard to the rule of Hindú Law on the subject.

"On the first point my opinion is that, supposing the Munsif to have rightly concluded that he was prevented awarding in the matter of interest an amount in excess of the sum decreed, the rule of Hindú Law applies only to a lump claim preferred for adjudication. Thus, if interest had been running on for years, and the instalments paid on that account had far exceeded the principal, I imagine that still the creditor would be entitled to a decree for a sum, on account of interest, equal to the principal, supposing that amount to be actually due.

"On the question raised by the respondent, I am of opinion that, in the face of Act XXVIII. of 1855 (an Act for the Repeal of the Usury Laws) the Munsif was wrong in having regard to the rule of Hindú Law on the subject. Under Reg. V. of 1827, which contained the old law on the subject of interest, it was expressly laid down, in Sec. 12, 'that this regulation is not meant to interfere with the rule of Hindú Law, which limits the interest of money to the amount of the principal, and which shall accordingly be maintained by the courts in all applicable cases.' Therefore, in all cases coming before the courts, interest was never allowed

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to a greater extent than the amount of principal. But I apprehend that this state of things was altered by the introduction of Act XXVIII. of 1855, which repeals the very section I have just quoted; and declares in its stead (Sec. 2) that 'In any suit in which interest is recoverable, the amount shall be adjudged or decreed in the Court at the rate (if any) agreed upon by the parties; and if no rate shall have been agreed upon, at such rate as the Court shall deem reasonable.' I consider, in the first place, that, by the repeal of the law which declared that the rule of Hindú Law shall be maintained in all applicable cases, it was intended that that rule should no longer be maintained; and, in the second place, that, to say that Sec. 2 of Act XXVIII. of 1855 says only '*at the rate*,' and therefore the rule of Hindú Law may be applied, is apparently playing with words. To me it appears that, under the last mentioned Act, claims to interest expressly agreed upon, ought only to be rejected when barred by the Limitation Act."

The case was heard before COUCH, C.J., and NEWTON, J.

PER CURIAM:—On the 1st question the Court are of opinion that the rule of Hindú Law is that, as was decided in Special Appeal No. 467 of 1863 (*a*), no greater amount of interest than the principal sum can be recovered at any one time.

On the 2nd question the Court are of opinion, in conformity with the decision of the High Court made on the 23rd of March 1863, that Act XXVIII. of 1855 has not, by repealing Sec. 12 of Reg. V. of 1827, or otherwise, altered the above rule of Hindú Law.

(*a*) 1 Bom. H. C. Rep. 47.

Referred Case.

RAMKRISHNABHAT *v.* VITHOBA bin MALHA'RJI'.

1863. March 23. Referred Case.

CASE referred for the decision of the High Court, by the Acting Judge of the Court of Small Causes at Puná, under Sec. 13 of Act XLII. of 1860.

1863. March 23. Referred Case.

The case was heard before SAUSSE, C.J., FORBES and NEWTON, JJ.

PER CURIAM:—It is considered that the Acting Judge of the Small Cause Court decided correctly, in holding that, as against a Hindú claiming the benefit of Hindú Law, the plaintiff was not entitled to recover interest beyond the amount of the principal sum secured by the bond or promissory note, which was the subject of the action.

Although Reg. V. of 1827 is now repealed, the Court consider that Sec. 12 contains what amounts to a legislative declaration of what the Hindú Law upon this subject is in the following words: "This Regulation is not meant to interfere with the rule of Hindú Law, which limits the interest of money to the amount of the principal."

NOTE.—"*Brihaspati*: 'On the precious metals [or gems] the interest may make the debt double.' * * * * *Kátyáyana* says: 'For gems, pearls and coral, for gold and silver * * * the interest stops when it doubles the debt.' * * *Vishnu*: 'On precious metals [or gems] the highest interest shall make the debt double.' * * * * * * * * * So also *Manu* (Ch. VIII. v. 151): 'Interest on money received at once [not month by month, or day by day, as it ought]† must never be more than enough to double the debt, [this is, more than the amount of the principal paid at the same time.]'† But in any one case where it is realized [by degrees] or at various times also, more than this legal or allowable interest may be levied, according to *Vijnánes'war*, and other authorities."—*Vyávahára Mayúkha*, Ch. v., Sec. II., v. 6, 7; *Stokes, H.L. Bks.* pp. 112—113.

"Stipulated interest beyond the legal rate, and different from the [preceding]† rule is invalid."—*Manu*, translated by *Sir Wm. Jones*, Ch. VIII., v. 152.

See also 1 Strange, H. L. 299, quoting 1 *Cole. Dig.* 133 et seq.; and *Steele, L. & C. of H. Castes*, pp. 78 and 260.—ED.

† The Gloss of Kullúka-bhatta.

Special Appeal No. 126 *of* 1866.

SAYA'JI' bin HABA'JI' BHADVALKAR..... *Appellant.*
UMA'JI' bin SADOJI' RAVU'T ..... *Respondent.*

Lease—Yearly tenant—Limitation.

A having been in possession of garden land from 1850, as tenant of B, under a two years' lease, continued to occupy, as yearly tenant, till 1860, when he was ejected in a suit brought against him by B.

In 1864, A sued B on a clause in the lease, which, he contended, gave him a right to remove certain trees planted on the land:—*Held* that the breach of contract (if any) took place when B took possession of the land together with the trees, in execution of his decree in the ejectment suit; and that A's claim was barred by Cl. 10 of Sec. 1. of Act XIV. of 1859.

Where, on the expiration of a lease, the lessee is allowed to continue in possession as a yearly tenant, he does so on the terms contained in the expired lease, so far as they are consistent with a yearly holding.

1866. August 22. S. A. No. 126 of 1866.

THIS was a special appeal from the decision of J. Gibbs, Judge of the Puná District, in Appeal Suit No. 283 of 1865, amending the decree of the Munsif of Puná, in Original Suit No. 303 of 1864.

The facts of the case appear from the following judgment recorded on the appeal in the District Court:—

"This is a suit brought by Sayáji to recover Rs. 125, the value of a building; Rs. 3,125, the value of 2,500 guava trees (perú); and Rs. 1,750, the value of their produce for four years. It appears that Umáji (in 1850) let a garden under a lease for two years to Sayáji; and that, after the expiration of the lease, Sayáji continued in possession as a yearly tenant, but having, when called upon to vacate, refused, Umáji sued him, and (in 1860) recovered possession of the garden.

"In the agreement is a clause (the 3rd) which was inserted for the benefit of Sayáji; and runs thus:—'The perú trees shall be removed when the two years of this lease shall expire, and no objection shall be made.' And it is on this clause that the present action is brought as regards the trees. Umáji defended the suit: pleading, 1st, that the claim was

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barred; and, 2nd, that it was not proved. The Munsif of Puná awarded for the building Rs. 14, for the trees Rs. 3,000, and for their proceeds Rs. 400. Umájí now appeals. He admits the building at Rs. 14; but objects to the decree against him for the trees, holding that portion of the claim to be barred.

"The question at issue is: Does Act XIV. of 1859 bar the claim for the trees; and I am of opinion that it does. It appears to be sometimes the custom to allow gardners to remove perú trees; and, accordingly, a clause was entered in this lease, giving Sayájí permission to do so. This he wishes now to do. While Umájí says he cannot; as the time has elapsed, and the claim is barred. The point turns mainly on, when did the cause of action arise. The agreement clearly fixes a limit, viz. two years after its execution, which would be 1852. * * * As the agreement which gave the right to remove that which, under ordinary circumstances, would have gone with the land, viz. trees planted therein, was a formal one in writing, no verbal or implied admission would extend the limit laid down therein; and, therefore, Sayájí's right to remove these trees commenced in 1852, and from that date must the cause of action be ruled to commence.

"Now comes the question as to the clause that applies. This must be either Cl. 10 or Cl. 16. Either it is a suit for a breach of contract under a written engagement, or it is one of those suits for which no special limit is laid down. Under the former clause three years and under the latter six years would be allowed. Under neither of these clauses could the claim be brought in 1864; and if respondent's argument, that the cause of action arose in 1860, when he gave over possession, be allowed, the former clause would still bar his claim. But I am of opinion that the subsequent possession of the garden does not save respondent's original right, which arose only in 1852. He might, perhaps, have removed these trees at any time while he was in possession, but once he gave over or had it taken from him, he must go back to his agreement, and his claim is barred.

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"I, therefore, under this view of the case, amend the decree of the Munsif, by rejecting so much of the plaint as relates to the trees and their produce; but confirm the portion relating to the building; costs in proportion."

The following (amongst other) grounds of objection were taken to this decision on special appeal :—

"That it is opposed to law, in that (1) the Judge was wrong in holding the claim barred by the law of limitation, since the cause of action did not arise up to the time the appellant was dispossessed of the garden, and a demand was made to remove the trees; (2) the Judge has misconstrued the agreement, in virtually holding that it was not necessary for the respondent to call upon the appellant to remove the trees, after the expiration of the period of two years, or subsequent to his (respondent's) obtaining possession of the garden; (3) the Judge was in error in not applying Cl. 12, Sec. 1. of Act XIV. of 1859 to this case."

The case was heard before COUCH, C.J., and NEWTON, J.

Dhirajlál Mathurádás for the appellant.

Reid and *Vishvanáth Govind Cholkar* for the respondent.

COUCH, C.J. :—In this case the plaintiff having been in possession for two years, as the tenant of the defendant under the lease, continued to occupy at the expiration of that term, and was treated by the defendant as still being his tenant. In 1860 the plaintiff was ejected.

It appears that there were on the land some guava trees, planted, it would seem, partly by the plaintiff's father, and partly by the plaintiff himself; and if the plaintiff had any right, either by custom or by agreement, to take those trees away, he ought to have exercised it between the date of the judgment and the execution of the decree in the ejectment suit. He did not, however, attempt to do so; and the defendant obtained possession of the land under his decree.

The plaintiff now sues on the clause in the lease, which, he says, gave him a right to remove the trees. The Judge

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below says that the period for removing the trees expired with the two years' lease. In that respect we do not agree with him. Where, on the expiration of a lease, the lessee is allowed to continue in possession as a yearly tenant, he does so on the terms contained in the expired lease, so far as they are consistent with a yearly holding.

On the mere construction of the lease* we should have much doubt whether there was any contract to allow the trees to be removed at the expiration of the tenancy; but the defendant himself seems to admit that was what the parties intended. The breach of contract, we think, took place when the defendant took possession of the land together with the trees in execution of his decree. That act showed his intention to break the contract. That being so, the suit was barred, and the Judge was right in the conclusion he came to.

Decree affirmed with costs.

* NOTE.—Clause 3 of the lease literally translated was as follows:—"In your garden plantation (*wávar*) are guava trees which were formerly planted by my father. These trees—after the expiration of my two years' lease—the guava plantation I shall vacate and give over (*khálí karún deú*). With regard thereto I shall not state any difficulty (*harkat sánganár náhí*)." And it was suggested on behalf of the respondent, that the object of this clause would seem rather to have been to prevent the lessee from putting forward any claim to remain in possession of the plantation at the expiration of the term.—ED.

Special Appeal No. 673 *of* 1865.

JIVA′ PATEL RAHIMNA′ ..... *Appellant.*

MA′LU′KJI′ MA′RU′ NATHUNA′ and others. *Respondents.*

Mesne profits—Interest—Separate suit—Act XXIII. *of* 1861.

Held, under Section 11 of Act XXIII. of 1861, that a separate suit could not be maintained to recover mesne profits or interest, payable in respect of the subject matter of a suit instituted after Act VIII. of 1859 came into operation; but that all questions relating thereto ought to be urged before, and be determined by, the court executing the decree passed in such suit.

1866. February 19. S. A. No. 673 of 1865.

THIS was a special appeal from the decision of A. Grant, District Judge of Ahmedábád, in Appeal Suits Nos. 159 and 172 of 1864, amending the decree of the Munsif of Dhandúká.

The Judge, in appeal, recorded the following judgment:—

"The brothers Málúkjí and Issá Márú succeeded, after a long course of litigation, in obtaining a decree establishing their title to a field of seven bighás; but were wrongfully kept out of possession for two years by Rahimná, father of defendants.

"They, therefore, brought a suit to recover the mesne profits for the two years Samvat 1916 and 1917 amounting to Rs. 416, together with Rs. 84 on account of interest, in all Rs. 500.

"The defence set up was, that the plaintiffs should have taken measures for enforcing their decree sooner; and that the suit was barred by Sec, 11 of Act XXIII. of 1861, according to which the plaintiffs should have made their demand for mesne profits in applying for execution of their decree.

"The Munsif of Dhandúká awarded plaintiffs the mesne profits claimed; but disallowed their claim for interest thereon.

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"The defendants appeal (Suit No. 159) on the grounds taken in their answer to the original suit. They also contend that the suit is barred by the Limitation Act.

"The plaintiffs appeal (Suit No. 172) on the grounds:—(1) That the Munsif was wrong in not awarding them the costs incurred in the revenue courts; (2) and also in disallowing their claim for interest.

"Issues: (1) Is the claim barred by the Limitation Act, No. XIV. of 1859; (2) or by Sec. 11 of Act XXIII. of 1861; (3) if not are plaintiffs entitled to judgment; (4) if so, should they be allowed the costs incurred in the revenue courts; (5) if so, also the interest claimed.

"I cannot find that claims for mesne profits are expressly provided for by any section of Act XIV. of 1859; and I am, therefore, of opinion on the 1st issue that the suit will come under Sec. 1., Cl. 16, and that it is not barred.

"The claim for interest is a corollary to that for mesne profits, and if the latter be allowed the former should be allowed also; and, under this view of the matter, I find on the 5th issue also in favor of the plaintiffs.

"The chief objection taken to the decree by the defendants is that founded on Sec. 11 of Act XXIII. of 1861, viz. that, by this section, which is a repetition of Sec. 283 of the Civil Procedure Code, all questions relating to any mesne profits or interest, which may be payable in respect of the subject matter of a suit between the date of the institution of the suit and execution of the decree, 'shall be determined by order of the Court executing the decree, and not by separate suit.' The argument on the other side is, that the original suit was instituted under the old law; and that it would be unjust to enforce the letter of the present law against the equity of the case, and at variance, moreover, with Sec. 387 of the Code, which says, 'But if, in any suit pending at the time when this Act shall come into operation, it shall appear that the application of any provision of this Act would deprive any party to the suit of any right in reference

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to the procedure of the suit, whether of appeal or otherwise, which, but for the passing of this Act, would have belonged to him, the Court shall proceed according to the law in force before this Act takes effect.'

"I think the principle contended for is a very fair one, and that the case under consideration is one in which there is special reason for applying it, in accordance with the equity of the matter; because the plaintiff's original application for the enforcement of their decree was made shortly after the new Procedure Code came into operation. I find, therefore, on the 2nd issue, that it is not necessary by law to enforce the strict letter of Sec. 11 of Act XXIII. of 1861; and, consequently, that the suit is not barred by that section. The very fact of the plaintiffs having, in the first instance, filed their suit in the revenue court shows that they misunderstood the nature of their claim, which is an additional reason for not exacting from them too severe a penalty for their ignorance of a new law. The technical objection to the suit having been overruled, the finding of the court, on the 3rd issue, must necessarily be that the plaintiffs have a right to recover the profits of which they were deprived by the wrongdoing of their opponents.

"As regards the costs incurred in the revenue courts, it is certain that the plaintiffs made a mistake in going into them at all; but, on the other hand, they were right in the appeal to the Collector, and had, moreover, justice on their side. I, therefore, resolve upon allowing them the whole of the costs in the Collector's court, along with the costs incurred in this and the Munsif's court; but order each party to bear his own expenses in that of the Mamledar.

"The Munsif's decree is, accordingly, amended by adding to the sum awarded to the plaintiffs the amount of interest claimed in the plaint, and apportioning costs as above set forth."

The grounds of objection taken to this decision in special appeal were as follows:—"(1) That it is contrary to

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the provisions of Sec. 11, Act XXIII. of 1861; (2) that the Acting Judge was wrong in holding that Sec. 387 of the Civil Procedure Code applied to the present suit, which was not *pending* when that Code came into operation; (3) that he was wrong in deciding that it was not necessary to enforce strictly Sec. 11, Act XXIII. of 1861; (4) that he disregarded the rule of law, that ignorance of law cannot be urged as a defence; (5) that in awarding interest he acted contrary to the provisions of Act XXXII. of 1839; (6) that he was wrong in awarding to the opponents costs incurred by them in a wrong court."

Nánábhái Haridás for the appellant.

Shántarám Naráyán for the respondent.

PER CURIAM (TUCKER and WARDEN, JJ.):—We have come very reluctantly to the conclusion that the decrees of the lower courts cannot be upheld.

This suit was instituted in the year 1864 to recover the mesne profits of lands, during the fiscal years 1859-60 and 1860-61. The plaintiffs had obtained a decree declaring their right to the said lands on the 8th of November 1859, which was affirmed in appeal on the 30th of January 1860; and the mesne profits claimed are those which had been wrongfully enjoyed by the defendants, between the institution of the plaintiffs' suit for the recovery of the lands and the execution of their decree.

Long prior to the institution of the present suit the Code of Civil Procedure and its supplemental Act (XXIII. of 1861) had become law; and in Sec. 11 of the latter Act it was enacted that any mesne profits or interest, which may be payable in respect of the subject matter of a suit between the date of the institution of the suit and the execution of the decree, shall be determined by the court executing the decree and not by separate suit. These words are precise, and, as has been said in a judgment of the High Court of Madras in a similar case, "they indicate positively the procedure

which ought to be adopted, and declare that the procedure here taken shall not be adopted" (*a*).

In the face of this positive direction of the law the form of action which the plaintiffs have adopted cannot be permitted. The District Judge considered that as the plaintiffs could have instituted a separate suit for these mesne profits prior to the introduction of the Code of Civil Procedure, and as their present cause of action had been barred by that Code and the subsequent enactment, they are still entitled, under Sec. 387 of Act VIII. of 1859, to have recourse to the old procedure. The section of the Code which the Judge has quoted applies, however, only to the procedure to be observed in suits "pending at the time when this Act shall come into operation." The present suit was not pending at that time; and the section referred to cannot be construed to support its institution, in opposition to an express prohibition.

The new code cannot be said to have deprived the plaintiffs of a privilege which they formerly possessed. It substituted a cheap and summary process for an expensive and tardy one; and the plaintiffs, having failed to avail themselves of the benefit conferred on them within the time prescribed for the execution of decrees, have sought to have recourse to the ancient remedy which is no longer open to them.

The decrees of the lower courts must be reversed; and as the defendant has from the commencement contested the plaintiffs' right to bring the action, and pointed out the course which the law directed, we consider that the plaintiffs should pay his costs.

Decrees reversed with costs.

(*a*) *Chennapa Náyudu* v. *Pitchi Reddi and others*, 1 Mad. H. C. Rep. 453.

Special Appeal No. 170 *of* 1865.

VINA'YAK DIVA'KAR, Deputy Magistrate F. P., Súrat District ..... *Appellant.*

BA'I' ITCHA', wife of Mahádhankar Harishankar. *Respondent.*

Held that neither Act XVIII. of 1850, nor Sections 68 and 212 of the Code of Criminal Procedure protect a Magistrate who has failed to act reasonably, carefully and circumspectly in the discharge of his duties.

Vithobá Mulhárí v. *Corfield*; *Bom. Sup. Ct.*, (*see Appendix, post*) followed.

1865. September 18. S. A. No. 170 of 1865.

THIS was a special appeal from the decision of C. H. Cameron, District Judge of Súrat, in Appeal Suit No. 82 of 1864, confirming the decree of W. M. Coghlan, Senior Assistant Judge of Broach, who tried the original suit.

The following judgment was recorded by the Senior Assistant Judge:—

"This is an action brought by Itchá, wife of Mahádhankar, a woman of the Bázkerává Bráhmín caste, to recover damages against Vináyakráo Divákar, Deputy Magistrate, holding the full powers of a Magistrate at Broach, for certain acts alleged to have been done by him in his magisterial capacity.

"The acts complained of are: the search of Bái Itchá's house in the absence of her husband; her being in the custody of the police for a night and a day; and her being ordered to find bail to the amount of Rs. 500, as a condition of release from custody.

"The defendant answers that he acted legally in taking the plaintiff's bail, under Sec. 212 of the Code of Criminal Procedure, on the complaint of one Rájárám Uderám, and on the report of the Fouzdar of Broach; that plaintiff was not in custody by his orders, and has suffered no loss at his hands. Defendant claims the protection of Act XVIII. of 1850.

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"Two issues have been fixed for trial in this case:—(1) Has the plaintiff suffered injury, loss of character, or other damages, from the act or acts, or from the order or orders of the defendant, as recited in the plaint; (2) if the plaintiff have suffered as above set forth, is the defendant protected from a civil action by Act XVIII. of 1850, in that he acted as a Magistrate in good faith, believing himself to have jurisdiction to do or order the acts done or ordered by him.

"It will be well, in the first place, to lay hold of the facts which may be considered as common ground in the case,—facts either asserted, or assented to, by both parties. These facts are, that, on the 3rd of September last, one Rájárám Uderám presented a petition to the Fouzdar of Broach, stating that Maháshankar Haríshankar, the husband of the plaintiff, had, under a decree of a civil court, attached some property of his, and had taken it out of his house, but returned it afterwards in consideration of a money payment; and that on examining the property returned, he found that four earrings, a finger ring, and Rs. 2 in cash were missing; and that he suspected Maháshankar of having taken them.

"The Fouzdar sent this petition to the defendant for orders, and the defendant issued a warrant to search Maháshankar's house. Both parties to the suit are agreed that Maháshankar's house was searched on the night of the 3rd of September, and again on the morning of the 4th of September; and that the police found, or reported that they found, at the first search, a brazen cup of the value of some three annas, and, at the second search, a finger-ring which Rájárám identified as his own; the cup being found in an earthen recess in a corner, and the ring in a locked box, which had to be broken open, the key not being at hand. Both parties are agreed that Maháshankar was absent at the time, and that his wife, the plaintiff Itchá, was at home and present at the search. It is also agreed that Itchá was required to attend the Fouzdar's office the next day, and was sent by the Fouzdar to the defendant, the Deputy Magistrate, and was sent back to the Fouzdar by the defendant, with an order

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that bail should be taken to the amount of Rs. 500; that the requisite bail was found, and that Itchá was released. So far is common ground: beyond this the parties are directly at issue.

"Plaintiff and her witnesses represent that she was under the close custody of a police guard, without food and without bedding, from the evening of the 3rd till the evening of the 4th; that she was taken publicly in custody of armed policemen from her house to the Fouzdar's office, thence to the Deputy Magistrate's office, and back again to the Fouzdar's office, when she was released on bail. The witnesses for the defence say that Itchá was at liberty—at any rate until the second search—that she slept in the inner room of her house on the night of the 3rd, and ate her morning meal at liberty. I must see which of these accounts is borne out by the evidence.

"Bálkrishná Jekrishná (1), next-door neighbour to Itchá, deposes that he saw her in custody of policemen, without a bed, in the verandah of her house, at midnight on the 3rd, and again at about 8 A. M. on the 4th; that he heard the Fouzdar order the police to take Itchá to his office; that he saw Itchá removed by the police from her house; and that he followed her, she walking between two policemen, as far as the old bazaar, where he left her; that he went to the Deputy Magistrate's office afterwards to see how matters were going, and saw Itchá stand between two policemen; that later in the day he heard the Deputy Magistrate order the police to take Itchá to the Fouzdar: and that he saw them take her away.

"Bhaíshankar (2), a witness called by both sides, and Gelábhai (3), neighbour of Itchá, who were called on by the police to witness the search of the house, depose to Itchá having been in custody in her verandah on the night of the 3rd and on the morning of the 4th of September; Gelábhai (3) further deposing to her having been in custody at the Deputy Magistrate's and the Fouzdar's offices, until bail was found, and to her weakness and exhaustion on her walk

home to her house. He describes Itchá as a young woman of about eighteen years of age.

"Jebháí Rámchandra (4), a brother-in-law of Itchá, deposes to having seen her in custody at the Deputy Magistrate's office, and to having petitioned the defendant to release her on his (Jebháí's) promise to produce Maháshankar Harishankar when required. Rámchandra Kálidás (5) deposes to having been at the Deputy Magistrate's office when Itchá was brought there, and to having heard the defendant say 'Bring your husband, or you will be sent to the jail at Súrat;' and to having seen her kept in custody till evening, when she was bailed by Mánchárám at the Fouzdar's office, and the key of her house returned to her by a policeman. Mánchárám (6) deposes to the same effect as Rámchandra, adding that he found bail for Itchá. The witnesses speak of Itcha's husband as a man of good commercial status.

"The plaintiff herself, whose deposition was taken by commission, under Sec. 175 of the Code of Civil Procedure, states that she was in close custody for a night and a day, and did not eat nor sleep during that time; that the Deputy Magistrate asked her where her husband was, and told her that she should be sent to the jail at Súrat.

"The Fouzdar of Broach (7) deposes that he gave no orders for Itchá to be placed in custody on the 3rd of September; but that on the 4th of September, when the ring was found, he suspected her, and gave orders that she should attend at his office; he says that if Maháshankar, Itchá's husband, had been present, he would not have required Itchá to attend at his office. The two policemen (8 and 9) who were on guard at the house state that Itchá was not in custody on the night of 3rd of September, but slept inside the house apart from the police guard, and cooked her meal in the morning.

"The evidence of Rájárám Uderám, the person on whose complaint the search warrant was issued, is to the effect that Itchá was not in custody during the search, and was not in

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the verandah of her house during the night of the 3rd of September, since he slept in a neighbouring verandah, and must have seen her, had she been there. His deposition was given in such an unsatisfactory manner that I place little, if any, reliance on it.

"Witnesses Nos. 11 and 12, neighbours of Itchá, depose to having seen the police in the verandah of Itchá's house, but that Itchá herself was not with them, and also to having seen her at liberty early next morning. Witness No. 13 deposes to having seen Itchá on the 4th of September at the Deputy Magistrate's office sitting apparently at liberty.

"The documentary evidence in the case (except on one point which will be noticed hereafter) goes to prove the facts admitted by both parties; and the further exhibits Nos. 35, 36 and 37 filed by the plaintiff refer to subsequent and different proceedings, and do not bear on the issues in this suit.

"The evidence is too contradictory to enable me to say, whether or not Itchá was kept without food and bedding in the verandah of her house on the night of the 3rd of September; but I think it is clearly proved that she was really in police custody from the evening of the 3rd until the evening of the 4th of September.

"The issue of the search warrant was legal under Sec. 114 of the Code of Criminal Procedure, and the defendant seeks to justify his other proceedings, by saying that he acted under the provisions of Sec. 212 of the same code; but this section in no way authorizes the retention in custody or holding to bail a person against whom no charge has been preferred. It runs thus: 'When any person shall appear or be brought before a Magistrate accused of any offence entered as not bailable in column 5 of the schedule annexed to this Act, such person shall not be admitted to bail if there appear reasonable ground for believing that he has been guilty of the crime imputed to him; but if the evidence given in support of the accusation shall, in the opinion of the

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Magistrate, not be such as to raise a strong presumption of the guilt of the accused person and to require his committal, or such evidence shall be adduced on behalf of the accused person as shall, in the opinion of the Magistrate, weaken the presumption of his guilt, but there shall appear to the Magistrate in either of such cases to be sufficient ground for further inquiry into his guilt, the accused person shall be admitted to bail pending such inquiry.'

"The proceedings under consideration are those of a magistrate. With regard to them the maxim *Omnia presumuntur rite et solenniter acta* does not apply; the law requiring the magistrate to show the legality of his proceedings, and not presuming regularity as it would in regard to a superior court. Sec. 212, above quoted, certainly affords the defendant no warrant for keeping Itchá in custody at his office, and then ordering her to find bail. She was accused of no offence, and no evidence had been given against her.

"Sec. 68 of the Code of Criminal Procedure allows a magistrate to take cognizance of an offence without a complaint, but it cannot he held to cover such proceedings as those of the defendant; since Itchá is not shown to have been known or suspected to have committed any offence, nor was any warrant or summons issued against her. The Fouzdar in his deposition says that he would not have sent Itchá to the cutcherry at all, if her husband had been present; and two witnesses (5 and 14) say that the defendant asked her where her husband was, and threatened to send her to the Súrat Jail.

"The defendant in his order to the Fouzdar (45) writes thus :—'Itchá resides in the same house in which the stolen property was found. Complainant cannot adduce proof against her; still her security for appearance in the sum of Rs. 500 should be taken, until the accused appears.' It appears to me that Itchá was not suspected of any offence; and that the ostensible reason of her being arrested and held to bail was to secure the presence of her husband

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Mahâshankar. I am glad that the evidence permits this deduction; as I see no other, consistent with a belief in the honesty of purpose of the Fouzdar and of the Deputy Magistrate.

"Looking at the matter in its best light, the fact is apparent that a woman, not charged with any offence, has been kept in custody for some twenty-four hours, because her husband was suspected of having stolen property in his possession. The whole proceedings, from the moment that Itchá's liberty was trespassed on by the police on the evening of the 3rd until she was released on the evening of the 4th of September, were illegal.

"The maxim *respondeat superior* applies in this case; and renders the defendant answerable for the conduct of the police authorities. The arrest itself must be considered as his act. It was not ordered by him; but he ratified it by continuing the custody and taking bail. A subsequent ratification has a retrospective effect, and is equivalent to a prior command. The rule is not without an exception; and the exception is in favor of a magistrate, who is not held responsible for the wrongful or illegal acts of his subordinates, if he can show that he himself acted within the scope of his jurisdiction. The defendant has not shown this, and cannot come under the exception. He must be regarded as the cause of whatever injury Itchá suffered from being in custody on the 3rd and 4th of September.

"For the above reason, I find on the first issue that the plaintiff has suffered injury and loss of character from the acts and orders of the defendant, in that she was illegally kept in the custody of the police from the evening of the 3rd of September 1863 till the evening of the 4th of September 1863, when she was illegally held to bail by the defendant.

"With regard to the second issue, it will be well to consider, first, the meaning of Act XVIII. of 1850; and, second, whether it protects the defendant in this action. The Act is as follows :—

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" ' *An Act for the Protection of Judicial Officers.*

" ' For the greater protection of Magistrates and others acting judicially, It is enacted as follows :—1. No Judge, Magistrate, Justice of the Peace, Collector or other person acting judicially shall be liable to be sued in any civil court, for any act done or ordered to be done by him in the discharge of his judicial duty, whether or not within the limits of his jurisdiction : provided that he at the time in good faith believed himself to have jurisdiction to do or order the act complained of: And no officer of any court or other person, bound to execute the lawful warrants or orders of any such Judge, &c., shall be liable to be sued in any civil court for the execution of any warrant or orders which he would be bound to execute if within the jurisdiction of the person issuing the same.'

" There are within my knowledge only two cases which bear on the interpretation of this Act (*Nujooshá* v. *Travers*, quoted by Vakil Sripatráo, does not bear on the interpretation of the Act), namely, *Vithobá Mulhárí* v. *Arthur King Corfield*, tried before *Yardley*, C.J., and *Jackson*, J., in the late Supreme Court at Bombay ; and *Laing* v. *Gubbins*, referred to by the learned Chief Justice in the former case.

" In *Laing* v. *Gubbins*, *Peel*, C.J., is reported to have said that the words ' good faith' in the Act are equivalent to *bonâ fide ;* and that the Act protected excusable errors only, and should not be extended to inexcusable errors. Sir *William Yardley*, in quoting this decision, said in the case of *Vithobá* v. *Corfield*, ' if this had been tried by a jury, I should have left it to the jury to say, whether the Magistrate had acted reasonably, circumspectly, and carefully ; and I should have added that a man could not be said to have so acted, unless he tried to avoid errors.' Sir *Charles Jackson*, concurring with the Chief Justice, added : 'It would be hard that a Magistrate should be held liable on the ground of misconstruing a statute.' The authors of the Penal Code have shown the force which they understood to attach to the words ' good faith ' by Sec. 52, which is as follows :—Nothing is

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said to be done or believed in good faith, which is done or believed without due care and attention.

"It is not too much to assume that persons invested with magisterial powers are of an average intelligence and discretion; and it cannot be too much for the law to expect from them such an amount of care and circumspection in the discharge of their office, as ordinarily discreet persons are in the habit of bestowing on private transactions.

"In the defendant's conduct in regard to the woman Itchá, I look in vain for care, circumspection, or an apparent wish to avoid error, or even for the exercise of such care as discreet men usually exhibit in their private transactions. The errors committed are not said to be, nor do they appear to be, the result of misreading the law; and I am happy to add that they have not been shown to be the result of ill feeling or of enmity. I attribute the wrong done to want of care and want of trying to avoid error: common care would have prevented defendant from keeping the plaintiff in custody and ordering her bail to be taken in the absence of any charge or information against her; and would have prevented him postponing taking Rájárám Uderám's deposition till several days after Itchá's release from custody.

"For the above reason I find, on the 2nd issue, that the defendant is not protected in this action by Act XVIII. of 1850.

"The remaining question is, what amount of damages is the plaintiff entitled to? She is entitled to fair and temperate damages for the wrong she has suffered. I consider the amount claimed (Rs. 9,000) as excessive. The plaintiff, by fixing her claim at so large a sum, has only herself or her advisers to blame, if the amount granted by me does little more than cover the costs. I give judgment for the plaintiff for Rs. 500, with costs in proportion."

The special appeal was heard this day.

Dhirájlál Mathúrádás for the appellant.

Nánábhái Haridás for the respondent.

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WESTROPP, J. :—In this case it appears that certain ornaments were taken possession of by Maháshankar, the husband of the plaintiff Itchá, in execution of a decree against one Rájárám, an act, upon the regularity or legality of which, we are not now called upon to pronounce any opinion. Those ornaments were, with certain alleged exceptions, returned in consideration of a satisfaction or part satisfaction of the decree by payment. The ornaments, alleged to be missing, were stated by Rájárám to have been improperly detained.

Under such circumstances, the proper course for Rájárám was to bring a civil action, in the nature of an action of detinue or trover, againt Maháshankar, or to have applied in the suit in which the decree had been made against him (Rájárám) for an order directing Maháshankar to restore those ornaments.

Instead, however, of taking that course, Rájárám repaired to the Fouzdar of Broach, and preferred a charge of theft against Maháshankar. The defendant, as a Full Power Magistrate, was applied to by the Fouzdar; and he (the defendant) ordered, first, a search of Maháshankar's house (in itself a very objectionable proceeding, inasmuch as the dispute as to the ornaments was purely of a civil character), and ordered, secondly, if not the original arrest, at least the detention of Maháshankar's wife, the plaintiff Báí Itchá, in custody, until she should give bail to the extent of Rs. 500, an order for which there was not a shadow of legal foundation, as, indeed, the defendant's own written order shows, mentioning, as it does, that Rájárám was unable to adduce any proof against her.

It is quite unnecessary for us, in considering whether or not the decree under appeal can stand, to look into the conduct of the Fouzdar previously to the appearance of the plaintiff before the defendant, or to resort to the doctrine of ratification. We find quite enough in the conduct of the defendant, so far as it affected the plaintiff, from the time of her appearance before him, to render him amenable to this

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action. Knowing that Rájárám had no proof whatever against her of the commission of any offence, the defendant sent her in custody to the Fouzdar and substantially ordered him to detain her until she gave bail. We cannot come to any other conclusion than that he made that order for the purpose of placing undue pressure upon the husband, who was then absent; and as to whose absence I may observe that there has not been anything brought to our notice to indicate that it was caused by any improper motive.

Conduct so illegal and oppressive is, we think, quite inconsistent with the reasonable, careful, and circumspect discharge of the duties of a magistrate. We concur in the doctrine laid down by *Peel*, C.J., in the Supreme Court at Calcutta, and *Yardley*, C.J., in the Supreme Court at Bombay, in the cases cited by the Senior Assistant Judge, that if a magistrate fail to act reasonably, carefully, and circumspectly in the exercise of his duties, and if, by reason of such failure, he do that for which he has not any legal authority, he cannot be permitted to say that, at the time he thus acted, he in good faith believed himself to have jurisdiction to do the act complained of, and he, therefore, cannot obtain the protection of Act XVIII. of 1850, nor of Section 68, or 212 of the Code of Criminal Procedure.

It has been contended that the case would have warranted the award of heavier damages than Rs. 500 against the defendant. Possibly that may be so, but we do not feel bound to express any opinion on that point, as the plaintiff did not appeal against the Senior Assistant Judge's decree on the ground of inadequacy of damages, or give any notice of her intention to raise that question under Sec. 348 of Act VIII. of 1859.

We affirm the decree of the lower court with costs.

TUCKER and WARDEN, JJ., concurred.

Decree affirmed.

Appeal under Sec. 36 of Act VIII. of 1859.

VENKAT SHRI'NIVA'S ..... *Appellant.*

J. F. ARMSTRONG ..... *Respondent.*

Act XVIII. of 1850 does not protect judicial officers from being sued in a civil court, except in respect of acts done by them in good faith in the discharge of their judicial functions.

When a plaint is presented to a judge against such an officer, which complains of a wrongful act on the part of that officer, the judge is bound to receive the plaint, and to leave it to the defendant to plead Act XVIII. of 1850.

1865. November 30.

THIS was an appeal, under Sec. 36 of Act VIII. of 1859, against an order of the District Judge of Kaládgi, rejecting a plaint under Sec. 32 of Act VIII. of 1859 as not showing any cause of action on the face of it.

The rejected plaint contained, among others, the following allegations:—(1) That the appellant was legally empowered by several persons, who had been convicted and fined by the second class subordinate magistrate of Hungund, to appeal to the respondent, who was the magistrate of Kaládgi, against the conviction. (2) That on his appearing accordingly before the respondent, the latter, without any reason whatever, prevented his conducting the appeal. (3) That in consequence thereof he suffered damage, inasmuch as he had to refund to his clients the fee he had received from them; and was prevented from earning the reward they had stipulated to give him, in the event of the said convictions being reversed. (4) That Act XVIII. of 1850 would not protect the defendant in this case: inasmuch as what he had done was done by him intentionally and wrongfully, and damage had resulted therefrom to the plaintiff.

The District Judge held that, as the act complained of appeared to have been done by the defendant in the discharge of his judicial functions as a magistrate, he was protected by

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Act XVIII. of 1850 from being sued in respect of it; and he accordingly rejected the plaint.

Nánábhái Harídás for the appellant.—The plaint disclosed the necessary ingredients of a tort: the existence of a right in the plaintiff to conduct the appeal; and the wrongful infringement of that right by the defendant. The Act referred to by the District Judge does not go the length of protecting judicial officers from the consequences of wrongful acts done intentionally.

Dhirájlál Mathúradás for the respondent contended that the defendant was protected by the Act.

WESTROPP, J.:—The plaint is not suicidal. It does not show that the magistrate in good faith believed he had jurisdiction to do the act complained of.

There may be circumstances, now undisclosed, which would show that he is protected by Act XVIII. of 1850; but it is for him to put them forward by way of defence and to prove them at the trial. *Primâ facie* the act complained of is a wrongful act. We express no opinion at present, whether the case may or may not come under the protection of the Act; but we think that the District Judge ought to have admitted the plaint.

We, therefore, reverse his order and direct that the plaint be received. Costs to follow the final decision.

TUCKER and WARDEN, JJ., concurred.

Special Appeal No. 604 *of* 1864.

AMRITRA'V P. KOKDI' and others ..... *Appellants.*
MA'NA'JI J. JAGTA'P and others ..... *Respondents.*

Possession of immoveable property—Burden of proof—Reg. V. of 1827, *Sec.* 1, *cl.* 1—*Application for Review—Discovery of new evidence—Civ. Proc. Code, Sec.* 376.

The plaintiffs' ancestors having been declared by a decree of the Peshwa's Government in A. D. 1722 to be entitled to the whole of the *Patilki watan* of Pánderái; and the defendants having produced a *watanpatra* from the Rájá of Sátárá in A. D. 1742 in favour of their claim to a half-share, but being unable to show that their ancestors had any concern with the *watan* for a period of 96 years subsequent thereto—during which the plaintiffs' ancestors were recognised as the sole owners :—

Held that the District Judge did not act contrary to law in throwing upon the defendants the burden of proving possession as proprietors for more than 30 years without interruption before the institution of the suit.

A rule to show cause why the decree of the High Court should not be reviewed, on the ground of the discovery of new evidence, was discharged; as the applicants failed to show that the document brought forward was admissible as evidence, and that it was not within their knowledge, or could not be adduced by them at the time when such decree was passed.

1865. December 6. S. A. No. 604 of 1864.

THIS was a special appeal from the decision of F. D. Melvill, Officiating Judge of the Puná District, in Appeal Suit No. 112 of 1863, confirming the decree of Chinto Vásudev, Munsif of Pátas.

The Original Suit was brought on the 10th of September 1861 by the Jagtáps: alleging that they were the owners of the whole of the Pátilkí watan of Pánderái, in the Purandhar Táluká of the Puná District, the management of which had been continued to them from early times down to the Faslí year 1270 (A. D. 1860), when the defendants, the Kokdís, claimed to be entitled to half the profits, and appointed one of their own family to conduct the office of Pátil of half the watan, which he did since then; and praying that they may be declared to be the exclusive owners of the Pátilkí watan.

The following judgment was recorded in the District Court :—

"This action was instituted by the Jagtáps against the Kokdís, to establish their rights to the whole of the Pátilkí watan of Pánderaí. * * *

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"The Pátas Munsif considered that the plaintiffs had established their right to the whole of the watan; and awarded the claim.

"The defendants have appealed on the following grounds:—(1) The decree is opposed to evidence; (2) it is opposed to the decree No. 23; (3) certain documentary evidence should have been received. This last ground of appeal has apparently been waived by the appellants, as they have in no way alluded to it.

"The points at issue are:—(1) Have the plaintiffs proved that they were at any time entitled to the whole of the watan; (2) if so, have the defendants proved 30 years' adverse possession.

"The plaintiffs have produced a decree (No. 4) passed by the Peshwá's Government, in A. D. 1722, in which they were declared to be the sole owners of the watan, to the exclusion of the Kokdís. They have also produced a great number of documents, bearing date in the 17th and 18th centuries, in which constant allusion is made to their exclusive right, in opposition to the Kokdís. To disprove the inference that would naturally be drawn from them, the defendants have produced a decree (No. 23), in which they are declared entitled to a moiety of the watan, and bearing date 1742; and a document (No. 125) bearing date 1743, in which orders were given that the terms of the decree were to be adhered to. With reference to this the plaintiffs admit that such a decree was passed; but urge that it was fraudulent and that this was recognised afterwards by the Government. *

* NOTE.—The decree No. 23 is as follows:— "*Watanpatra* from Rájá Shâhu Chhatrapati to Sultánji Sukhají and others, Kokdí Mukádam Pátil of Pánderái, written on Shrávan Shuddha 5, Sunday, in the 69th year of the Era of Shiváji, to wit: There had been a long-standing dispute between you and the Jagtáp, and, therefore, you came before the Rájá last year, and stated as follows: that the Pátilkí watan of Pánderái belonged to you as your own property; and that you had appointed the Jagtáp to manage the watan as your agent; that the Jagtáp subsequently claimed the watan, and enjoyed it in the absence of your father; that the dispute was afterwards decided in favour of the Jagtáp, and you were compelled to give up in writing all your claims to the Jagtáp: whereupon you left the country and remained in exile, and on your return requested the Rájá to decide the matter again, as the former decision was wrong, and requested us to peruse all the rázinámás by the par-

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Many of the documents produced by them have reference to the fact of such a decree having been passed and to its being null and void. The defendants have produced no document bearing date between 1743 and 1839. There is nothing to show that they had any concern in the watan during that period of 96 years; whereas on the contrary the documentary evidence for the plaintiffs prove that they were during that period recognised as the sole owners. It is clear that no oral evidence can prove what were the rights of the parties during the last century. I consider it established, then, that the plaintiffs were at one time,—that is, at the end of the last century,—entitled to the whole of the watan.

"The *onus probandi* on the second point at issue is, of course, on the defendants. The earliest of the documents filed by them, which have any reference to this part of the case, bears date 1839,—that is, only 21 years before the institution of the suit. There is no doubt that since that time their names have been entered jointly with the plaintiffs. All the oral evidence is in favour of the defendants; but on the face of the documentary evidence I cannot consider that it proves the fact of 30 years' possession. The most important witness is one for the plaintiffs (No. 52), who states that the watan was attached by Government, who have from the

ties, in which they agree to settle the dispute amicably by the Jagtáp taking only one half-share, and the Kokdí taking the other half-share of the Pátilkí watan. The Rájá has perused the three rázinámás, and is of opinion that the whole Pátilkí watan at one time belonged to the Kokdí, but it was enjoyed by the Jagtáp for a long period; and it is hereby ordered that half the watan be given to the Jagtáp, and that the other half be enjoyed by the Kokdí, as agreed to between the parties in the rázinámás; and all the other documents, which may be in the possession of the parties, should be considered as cancelled."

On this the plaintiffs observe:—"The ancestors of the defendants having obtained this *watanpatra* by improper means from the Mahárájá, our ancestors obtained a letter from the Peshwá, from which, and from others which followed, it appears that the contention of the defendants is not true, and the management (*vahivát*) has never been in accordance with it."

The letter (Ex. No. 34) from Bálájí Bájiráo Peshwá to Mudhojí Jagtáp and others is as follows:—"Your letter has been received. The dispute about the watan has been already decided by the Rájá. And notwithstanding that decision, the Kokdí have now renewed the dispute, by taking Sachiv Pant on their side; but you need not fear on that account. We have written much to Sadobá and Dádobá, who will suspend the sealing and execution of the documents by the Rájá until we come to Sátárá and procure the release of Sambhájí Jagtáp, now imprisoned by the Sachiv."—Ed.

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year 1833 appointed one or more from each family to conduct the Pátilkí duties. The watan was, it appears, attached in consequence of disputes between the two families. The plaintiffs have admitted the accuracy of that date (*vide* exhibit No. 36); but that only shows about 28 years' possession on the defendants' part. It is difficult to understand how the defendants have not been able to produce any documentary evidence to prove their 30 years' possession, if such has been the case. And as they have not done so, I must, as I have already observed, refuse to consider the fact proved by the oral evidence alone.

"My finding on the points at issue is: (1) that the plaintiffs have proved that they were at one time entitled to the whole of the watan; (2) that the defendants have failed to prove 30 years' possession. * *

"I confirm the decree of the Munsif: costs on the appellants."

The special appeal came on for hearing on the 21st of December 1864 before COUCH and WARDEN, JJ.

Vishvánáth N. Mandlik for the appellants.—Exhibit No. 23 being the last decree between the ancestors of the parties produced, the Judge was wrong in presuming it to be tainted with fraud. There was no proof that it had actually been obtained by fraud, or that it was formally set aside by any subsequent decree. The burden of proving 30 years' adverse possession was improperly thrown upon the defendants.

Reid (with him *Shántárám Náráyan*) for the respondents.—Having found that the plaintiffs' ancestors were at one time declared to be the exclusive owners of the watan, and were recognised as such in the documents for a period of 96 years; and that the defendants had failed to show that their ancestors had any concern with the watan during that period, or that the *watanpatra*, No. 23, produced by them had ever been acted upon; the Judge was justified in requiring the defendants to prove possession as proprietors for a period

of 30 years preceding the suit, under Reg. V. of 1827, Sec. 1, cl. 1.

COUCH, J.—In this case the Judge below laid down two points for decision; and put upon the plaintiffs the burden of proving the 1st issue, namely, that they were at one time entitled to the whole of the watan. And this the plaintiffs proved by the production of the decree of 1722 (Exhibit No. 4), and by showing an adverse possession by their ancestors for a period of 96 years (from 1743 to 1839), during which they were recognised in the documents as the sole owners of the watan; and that was after the decree (Exhibit No. 23) in favour of the defendants' ancestors for a half share had been passed in 1742.

Now, it is contended on behalf of the defendants (the special appellants in this Court) that, Exhibit No. 23 being the last decree between the ancestors of the parties that has been produced in the case, it should be shown either that it had actually been obtained by fraud and consequently treated as null and void, or that it was formally set aside by some subsequent decree. The Judge says that many of the documents produced by the plaintiffs have reference to such a document having been passed, and to its being null and void; and as he found no reliable evidence adduced by the defendants to show that the decree had ever been acted upon, he was justified in presuming, after such a lapse of time, either that it had been formally set aside, or that it had been abandoned as a decree that could not be maintained.

The plaintiffs having succeeded in establishing the first issue, the Judge did not, we think, act contrary to law in throwing upon the defendants the burden of proving possession as proprietors for more than 30 years; as otherwise the plaintiffs were entitled to the judgment of the Court on the first issue.

We, therefore, affirm the Judge's decree.

Decree affirmed.

1865.
December 6.
S. A. No. 604 of 1864.

Dallas, on the 25th of March 1865, obtained a *Rule nisi*: calling upon the respondents to show cause why this decree should not be *reviewed*, on the ground of the discovery of fresh evidence—a paper which had been produced before the Inám Commissioner, and which related to the management of the watan by the appellants.

Reid now (Dec. 6) appeared to show cause.—We have had no opportunity of seeing the new evidence. The document should have been filed in Court and translated. It must also be shown that the document was not within the applicants' knowledge, or could not have been adduced by them when the decree of this Court was passed.

Hayllar, in support of the Rule:—The document now produced purports to be a copy of an original agreement between the Collector and the Kokdís in A. D. 1828-9,—that is, within the period of 96 years, during which the Judge found that there was nothing to show that the defendants had any concern with the watan.

It was ordered by the Court that the deposition of the applicants' Muktyár should be taken before the Registrar; and on the same being read in Court it appeared that the document produced was not even a correct copy to the knowledge of the deponent, and that the absence of the original was not accounted for; and also that the deponent, who had been managing the defendants' case from the first, was aware of the existence of the paper now produced when the suit was tried by the Munsif, but that he did not search for it then, and that it was found amongst his papers after the decree of the High Court had been passed by the kárkún who copied it some years before.

PER CURIAM:—*Rule discharged.*

Special Appeal No. 836 *of* 1865.

K. P. SULE .....*Appellant.*
DHUNDI'RA'J VINA'YAK .....*Respondent.*

Grant of land—Receipt of rent—Acquiescence.

In a suit to recover possession of land, where it appeared that the defendant's father had, in A. D. 1801, obtained possession on a lease of 280 bighás from the Government of Kulába, and that the plaintiffs' father had, in 1806, obtained a grant of ten unspecified bighás of the same land, but that he never asked to have them marked out and given to him *in specie*; and that he and subsequently his sons the plaintiffs were content up to the year 1856 to receive from the defendant's family, in respect of their grant, the rent formerly paid by them to the Government for the same: the District Court reversed the decree of the Munsíf, and threw out the claim to recover possession of the land, on the ground that the plaintiffs must be taken, after such a lapse of time, to have acquiesced in the arrangement that a yearly rent was to be received without any particular land being marked out as theirs:—

Held that it was competent for the Assistant Judge to come to that conclusion, under the circumstances; and that there was no ground for saying that there was any error of law in his decision, which was accordingl y affirmed.

1866. July 16. S. A. No. 836 of 1865.

THIS was a special appeal from the decision of C. B. Izon, Acting Assistant Judge of the Konkan, in Appeal Suit No. 72 of 1864, reversing the decree of Mukundaráo Bháskar, Munsíf of Pen, in Original Suit No. 2460 of 1861.

Keshav and Lakshuman, sons of Pándúrang Sule, brought the suit for the recovery of ten bighás of land out of a field named Bhangárí: stating that the same had been granted as inám to their father by His Highness the late A'ngriá of Kulába, and that an order had been sent to the Pátíl and to the father of the defendant in A. D. 1806-7 to deliver over possession thereof; that in A. D. 1826-27 the Honorable Company's Government made a list confirming ináms to the defendant's father and his subordinates, which contained the item of Rs. 80-9-0 on account of the ten bighás granted to their father; that the defendant's father used to pay to them the amount accruing due from the ten bighás; but that it had been stopped since the year 1856-57.

1868. July 10. S. A. No. 896 of 1865.

The defendant pleaded possession for longer than sixty years; that the rent merely of ten bighás was granted to the plaintiffs' father, which he did not object to; that as no demand for it was made since the year 1856-57, it had not been paid; and that the whole field having been granted under a kaúl to his father in 1800-1, the Kulábá Government had no right to grant as inám any land out of it; and that a suit to recover possession of the land would not, therefore, lie.

The issues laid down by the Munsíf were as follows:—(1) whether the plaintiffs have properly valued their claim; (2) whether the claim is barred by the law of limitation; (3) whether the plaintiffs are entitled to recover possession of the land from the defendant.

The list, No. 57, confirming the ináms was produced by the defendant, and showed the amount of annual rent payable for the land in question to be Rs. 80-9-0; and the plaintiffs having valued their claim at eighteen times that amount, the Munsíf found the suit to be properly valued. And it being admitted that rent on account of the Inám was paid to the plaintiffs up to the year 1857, the claim was not barred.

As to the question, whether it was the land that was granted as inám to the plaintiffs' father, or merely the rent of it due to the Kulábá Government—the defendant retaining possession of the land—the Munsíf held that, as the whole field was held by the defendant's father from the Government under a kaúl or lease, which did not give the land away absolutely; and as the same government subsequently granted to the plaintiffs' family ten bighás out of that field for maintenance, and, further, as it afterwards issued to the defendant's father an order directing the delivery of separate possession to the plaintiffs' father, it was put beyond doubt that the land *in specie* was granted to the plaintiffs' family. And although the plaintiffs' family admittedly never had possession—receiving only the rent—that did not amount to a relinquishment of the inám land by them. The Munsíf, accordingly, passed a decree in their favour.

1866
July 16.
S. A. No. 836
of 1865.

The defendant appealed, urging that the rent only was granted to the plaintiffs' father by the sanad; that the land belonged to him, having been granted to his father on account of his having reclaimed it; that possession had never been taken, agreeably to the order directing delivery of the ten bighás, which order was, therefore, ineffectual; and that the Government had no right to grant the land in inám.

The Assistant Judge laid down the following issues for decision:—(1) what is the meaning and scope of the sanad No. 4, that is, whether its purport was to grant the land; (2) if so, whether such grant was to any extent invalidated by the previous right of the defendant under the kaúl No. 12; (3) whether the fact that plaintiffs never had been in occupation, and never obtained the specification and demarcation of the land granted to them by the sanad, debars them from evicting the defendant; (4) whether the plaintiffs since 1856-57 ever demanded rent, and whether on such demand defendant refused to pay rent or not.

On the first issue the Assistant Judge was of opinion, upon the construction of the sanad and the order, both issued on the same day, that the land was clearly granted in inám to the plaintiff's father, Páṇḍúrang Narsinhá; and that the plaintiffs were and are in the position of inámdárs. He, accordingly, held that the sanad No. 4 was a grant of ten unspecified bighás of land out of the khár Bhangári in inám to Páṇḍúrang; and that it was intended to confer such possession as is usually conferred on inámdárs.

On the second point the Assistant Judge found that the rights conferred on the defendant's family did not in any way invalidate the grant to the plaintiffs, on the ground that the kaúl (No. 12) mentioned no term during which the land was to be held, nor was it mentioned that it was to be held in perpetuity—the words used being that so much rice should be paid yearly (*sál dar sál*); that in the kaúl, Government had not made over any of its own rights: it did not confer the rights of an inámdár, but only possession of the land at a reduced rent; that if some of the rights con-

1866. July 16. S. A. No. 836 of 1865.

ferred by the previous grant were in conflict with some given by the subsequent one, the Government, which was absolute, might have so acted, and the last rather than the first sanad should then be looked to; but here the kaúl and the sanad did not conflict.

On the third and fourth points the following observations were recorded:—

"On the third point I find that the plaintiff is debarred from evicting the defendant now, in consequence of his never having taken any precise land into his possession. The grant was in 1806; and I think by this time he must be held to have acquiesced in the arrangement that he was to receive his yearly rent without any particular land being marked as his. No doubt at the time he might easily have enforced the order of the Government, and obtained some particular land being set aside as his. But at present from what land is the defendant to be evicted? Some unknown ten bighás out of two hundred and eighty.

"The mere fact of his never having had occupation of the land himself could not debar the plaintiff from evicting a tenant who refused to pay his rent. But it is widely different when the inámdár has suffered his right to lie dormant for sixty years, without ever taking the trouble to have the land marked out.

"On the fourth point no finding is at present required; but if it should be decided by a higher court, that even lâches so long and peculiar on the plaintiff's part does not debar him from obtaining possession of the ten bighás, then it would become necessary to decide whether, in effect, defendant refused to pay rent, and so a cause for evicting him has arisen. The defendant pleaded that he was willing to pay rent; nor can I think the paper No. 36 at all sufficient to prove that he ever refused to pay. The issue, however, was not laid down by the Munsif.

"If my view of the case is right, plaintiff is only entitled to sue for rent, and not for possession of the land. I, accordingly, reverse the Munsif's decree, and throw out the claim."

1866.
July 16.
S. A. No. 836 of 1865.

The special appeal came on for hearing this day before COUCH, C.J., and NEWTON, J.

Dhirajlál Mathurádás for the appellant.—Although the land has not been marked out, still the plaintiffs' title has been uniformly acknowledged by payment of rent. The principle of Reg. V. of 1827, Sec. 1, cannot apply to this case. Under the older decisions the right to one's mirás was never barred: it could be asserted at any time. It has by recent decisions been ruled, that any person holding for thirty years acquires a right by prescription, whether the land held be mirás or any other; but that ruling cannot apply to this case, for here the respondent has not been holding *as proprietor*. The Assistant Judge was wrong in law in not awarding possession.

Shántárám Náráyan, contra, contended that the kaúl having been granted in 1801, the relation of landlord and tenant was, from that time, created between the defendant's father and the Government; that the lease at the reduced rent was granted in consideration of improvements, and was a permanent lease; that if the grant to the plaintiffs' father was of the land and of its possession, the claim to have it marked out was barred by Reg. V. of 1827, Sec. 4. But, apart from that, the Judge had found, from the long and silent acquiescence of the plaintiffs, an arrangement between the parties that the plaintiffs should take the rent, and the defendant hold the land, permanently. There was no refusal to pay rent; and the Judge had expressed himself in favour of the defendant so far as the present finding went.

COUCH, C. J.—The facts of this case appear to be these: The kaúl was granted to the defendant's father in 1801 by the government of that time; and he became a tenant under that government. Afterwards in 1806 came the grant to the plaintiffs' father, in which the kaúl of 1801 is not referred to.

It is doubtful whether the plaintiffs' father ever had a right to eject the defendant's father. Although it might be that an arbitrary government might not always respect its

1866. July 16. S. A. No. 896 of 1865.

engagements, we ought to presume that it would be doing what was fair and proper. Possibly the plaintiffs' father may have had a right to enforce the marking out and separate delivery of possession to him of the ten bighás; but after this lapse of time we cannot say what arrangement was intended to obtain between the parties. It is not for plaintiffs, who have been content to receive the rent for so long a period as fifty-five years, to turn round and call upon the defendant to give evidence of what that arrangement was.

Looking at the kaúl and the circumstances of the case, it was quite competent for the Assistant Judge to hold that the plaintiff was not entitled to recover the land. There is no ground for saying that he committed any error in law in deciding as he has done. If the defendant refuses to pay rent, the plaintiff may bring his suit to recover it; but we can make no order upon that subject in the present suit, which is merely to recover possession of the land.

We, therefore, affirm the decree of the Court below with costs.

Decree affirmed.

Special Appeal No. 844 *of* 1865.

BA'BA'JI' bin RA'MJI' .....*Appellant.*

KA'SIMBHA'I valad AZAMBHA'I and others...*Respondents.*

Remand to District Court to correct a defect—Mistake of District Judge—Second remand.

An Acting District Judge having made a decree, reversing the decree of the Munsif who threw out the plaintiff's claim, omitted to pass a decree himself in favour of the plaintiff, which his finding showed he intended to do: the case was remanded on special appeal by the High Court to the District Court, with an order that a decree should be passed; but the District Judge (who had meanwhile returned to his appointment) re-opened the whole case, and passed a decree directly opposed to that of his predecessor, in which he confirmed the Munsif's decree:—

Held **that the decree of the Judge should be reversed, and the suit again remanded, in order that he might pass a decree for the plaintiff, in accordance with the view of the case expressed by the Acting Judge, with which the High Court saw no ground, upon the special appeal before it, to interfere.**

1866. July 26. S. A. No. 844 of 1865.

THIS was a special appeal from the decision of R. F. Mactier, District Judge of Sátárá, in Appeal Suit No. 443 of 1863, confirming the decree of the Munsif of Rahimatpúr, in Original Suit No. 812 of 1863.

The suit was brought by the appellant to recover possession of some land; and the Munsif threw out the claim.

In appeal the Acting District Judge, Baron A. J. DeH. Larpent, reversed the Munsif's decree; but omitted to pass judgment himself in favour of the plaintiff, which his finding showed he intended to do.

The defendant then preferred a special appeal, No. 724 of 1864; and the High Court passed the following order on the 28th of November 1864:—

"The Court, finding that the Acting District Judge has merely reversed the decree of the Munsif giving judgment against the plaintiff, with costs on Kásim and Bábáji, but that he has passed no decree in the suit for or against either party, remands the case for the Judge to pass a decree: costs of this appeal on special appellant."

Thereupon the Judge, R. F. Mactier, who had meanwhile rejoined the office—after noticing that the suit had been remanded by the High Court for the purpose of the Judge's passing a decree—thought it as well to go through the facts of the case which, in his opinion, was rather a curious one; and having considered it afresh on the merits, decided it contrary to the view taken by his predecessor, recording a judgment against the plaintiff and passing a decree accordingly.

The present special appeal was then preferred.

Bháiravanáth Mangesh for the appellant contended that, the High Court having remanded the case merely for the passing of a decree according to the decision recorded by the Acting Judge, the lower court had no power to go into the merits of the case again; and that, in entering into the merits, the Judge had overlooked the most important point

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decided by his predecessor, namely, whether or not Kásim's resignation was fraudulent.

Dhirajlál Mathurádás for the respondent.

COUCH, C. J.—When the judgment of the Acting Judge is read, it is clear what was intended by the High Court's decree of remand. That judgment proceeds upon a question of fact: and, after a consideration of all the facts, it concludes with a decision in favour of the plaintiff.

It was not intended to interfere with that judgment; and the former decree of the High Court contained a sufficient indication of what was to be done by the Judge upon the remand. It very plainly shows that the ground of the reversal of the Acting Judge's judgment was merely to correct a defect.

The case, then, goes back to the Judge, in whose absence the former judgment was passed. He remarks that it is a curious case, and goes into the merits, whilst he has himself assisted in making it a curious case. He has overlooked the point that Kásim, being a trustee for Bábáji, had fraudulently turned the trust to his own use; although that was the most material point in the case, and the point upon which the decision of the Acting Judge turned.

Upon that ground we might, perhaps, reverse his decree; but, since he was directed merely to pass a decree with the view of correcting a defect in the proceedings of the former Judge, we prefer to reverse his decree upon that ground.

Decree reversed and suit remanded.

Special Appeal No. 416 of 1865.

BA'LA'JI J. RAHA'LKAR .....*Appellant.*
NA'RA'YANBHAT son of Anantbhaṭ .....*Respondent.*

Rent-free grant of building-site—Forfeiture—Construction.

A received from B the use of a piece of his ground rent-free, which he thus acknowledged in writing: "Building a house thereon, I shall enjoy so long as I and my kinsmen *live* therein. I shall have no right to *sell* the ground to another." A house was built on the site and inhabited by A and his heirs for several years, until it was destroyed by fire, when the heirs commenced to build a new house upon a portion of the ground having leased another portion of it for building upon, and having mortgaged the whole of it:—

***Held* that the heir of B was entitled to recover possession of the ground, as the conditions of the grant had not been observed; and that the word *sell* must be construed as prohibiting alienation of any kind.**

1866. July 24. S. A. No. 416 of 1865.

THIS was a special appeal from the decision of C. B. Izon, Acting Assistant Judge of the Konkaṇ, in Appeal Suit No. 619 of 1864, confirming the decree of the Munsíf of Peṇ, in Original Suit No. 416 of 1864.

The respondent Náráyaṇbhaṭ sued the appellant Bálaji and his father, as the heirs of Hari Raghunáth, and Gaṇesh Gangádhar Ketkar, as claiming under them, to establish his right to, and recover possession of, a piece ground in Voshí village, Táluká Sánkse, Zillá Konkaṇ, which in 1824 was given to Hari Raghunáth under an agreement to build a house on. In 1863 that house was burnt down, and the defendants Nos. 1 and 2, without permission, began to build a new house; and gave a portion of the ground to the defendant No. 3 to build on, and, moreover, mortgaged the whole of it.

Bálaji and his father answered, denying knowledge of the agreement said to have been passed by Hari; and stating that they had held the land for sixty years; that they had not let any of it to Gaṇesh, nor mortgaged it, but only begun to build a new house; and that the agreement No. 3 was upon unstamped paper.

1866. July 24. S. A. No. 416 of 1865.

The Munsif of Poṇ decreed for the plaintiff, finding that the agreement was proved, that it did not require a stamp, and that the possession of the defendants was only that of tenants.

Upon appeal the Acting Assistant Judge recorded as follows:—

"The issues before the Court are:—(1) whether the agreement No. 3 was proved or not; (2) whether the fact of its being on unstamped paper is any objection to its being received in evidence; (3) whether, if the agreement is valid evidence, any cause of action has arisen at present or not. No other issue being sought, I proceed to pass judgment.

"On the first point I find that the agreement No. 3 was proved; and on the second point that it is good evidence, although on unstamped paper. * * * In 1824, as there was, I believe, no stamp law (*vide* preamble of Reg. XVIII. of 1827), there could be no necessity of stamping documents of this kind.

"On the third point—that a cause of action arose, when defendant gave some of the ground to one man and mortgaged it to another—there can, I think, be no doubt whatever. The agreement, it is true, mentions only 'I will not *sell* the ground;' but mortgaging or giving is equally an encroachment on the rights of the owner. I find that a cause of action has arisen.

"I affirm the decree: costs on appellant."

The special appeal came on for hearing this day before Couch, C.J., and Newton, J.

Dhirajlál Mathurálás for the appellant contended that the agreement of Hari had been misconstrued, and a wrong effect given to it, inasmuch as it contained merely a stipulation against *selling* the land; whereas, although there had been no sale, the forfeiture contemplated by it in the event of a sale alone had been enforced. No cause of action had arisen, the mortgaging or leasing the land was not prohibited

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Vishvanáth Náráyaṇ Maṇḍlik for the respondent.—The document, after reciting that the grantee had occupied an old house, and was about to build a new and a larger house upon the grantor's ground, goes on to say: "Thereupon I took from you ground for building by *asking you*. Building a house thereon, I shall enjoy so long as I and my kinsmen *live* therein. I shall have no right to *sell* the ground to another." The right acquired by this document is merely the right of *personal use*. It is a grant to build a house and to live in it; but not to alienate in any way the ground or the building upon it. Mortgaging and leasing are both *sales* in a qualified sense of the term; and as such are in contravention of the conditions of the grant.

Cur. adv. vult.

Couch, C. J.;—The decision in this case depends upon the construction to be given to exhibit No. 3, which is an express acknowledgment that the grantee had taken ground from the grantor for the purpose of building thereon a house, which the grantee and his kinsmen were to occupy (rent-free) as long as they continued to live in it themselves; and it is specially provided that they "have no right to *sell* the ground to another."

There is no grant of any interest in the land, except of the personal use of it for the particular purpose specified; and we think that it must have been intended by the parties to the grant that it was to expire when the grantee and his kinsmen ceased to occupy the house themselves.

Although the word *sell* only is used, we must construe the document as forbidding alienation of any kind by mortgaging, leasing, or otherwise: for the object of the provision clearly was to prevent the grantees having any right of disposal over the land. They merely get a conditional grant of the use of it. And we think that they have forfeited all right to a continuance of that use by assuming to deal with the land as if they were themselves the owners of it, in violation of the condition of the grant. By letting a portion of the

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ground and by mortgaging the whole of it, defendants Nos. 1 and 2 have put an end to the agreement; nor is this a case in which we can give them any relief, or award them compensation in consequence of the resumption of the land by the heir of the grantor.

The plaintiff only claimed to recover possession of the ground, which has been awarded to him by the courts below; but, to prevent any misconception, we may observe that, according to the custom of the country, the grantee has a right in such a case to remove the materials of the building constructed by him on the land.

Decree affirmed.

Special Appeal No. 48 *of* 1866.

GANGUBA'I kom SIDHA'PPA' and another...*Appellants.*
RA'MANNA' bin BHIMANNA' .....*Respondent.*

Undivided Hindú family—Alienation.

Held that, on this side of India, a member of an undivided Hindú family cannot, without the consent of his coparceners, make a gift of his share in the undivided property, or dispose of it by will.

1866. July 11. A. No. 48 of 1866.

THIS was a special appeal from the decision of W. Sandwith, Joint Judge of the Puná District, in Appeal Suits Nos. 178 and 186 of 1864, amending the decree of the Ṣadr Amín of Solápur in Original Suit No. 29 of 1864.

Rámanná, in the original suit, claimed to recover possession of a house in Solápur: alleging that it formerly belonged to his father, after whose death it passed to his elder brother, Sidháppá, and that after the death of the latter it was retained by the defendant, Gangubái, his widow.

The defendant, Gangubái, answered, alleging separation—twenty years before—between her deceased husband, his brother the plaintiff, and their father, Bhimanná, and that her husband, to whose share the house had fallen, had given it to her elder daughter, Sáubái.

1866. July 11. S. A. No. 48 of 1866.

The defendant Sáubái pleaded gift from her father, the late Sidháppá, in 1862. The original deed of gift was lost, but she produced a copy from the district register.

The Ṣadr Amín awarded to the plaintiff half the house, with costs in proportion.

Against this decree both the plaintiff and the defendants appealed: the former urging that, as no separation had taken place, the award of only half the house was unjust; and the latter that the separation was proved, and consequently the plaintiff's claim was altogether untenable.

The Joint Judge, in appeal held it proved that no separation had taken place; that Sidháppá had no power to give away the property; and that the plaintiff was entitled to the whole house. He accordingly amended the Ṣadr Amín's decree, by awarding the whole house to the plaintiff with costs.

Howard (with him *Fakirápá* bin *Lingápá*) for the special appellant.—Sidháppá had power to dispose of the house. He was separated from his brother, the plaintiff, who, before the Magistrate, disclaimed any right to the house. [COUCH, C. J.:—That was a question of fact, and it has been found by the Judge that there was no separation.] At all events, he was entitled to half of the house, and could alienate it. The late Ṣadr Adálat always held that, at the suit of a creditor of a sharer, partition could be enforced. It follows, then, that the purchaser, or even the donee, of such share may similarly enforce partition. The equities are the same whether the creditor sells the undivided share or the coparcener sells or gives it away. There is an equity in favour of the lady now in possession of the house, and it would be unconscientious in the other sharer to oppose division. *D. V. Khare* v. *D. H. Somana*, S. A. No. 609 of 1863 (*a*); *Goondo Mahadeo* v. *Rambhut*, S. A. No. 92 of 1863 (*b*); 1 Stra. H. L., 24, 176, 200-1.

(*a*) 1 Bom. H. C. Rep. 183. (*b*) *Ibid.* 39.

1866. July 11. S. A. No. 48 of 1866.

Bhairavanáth Mangesh, contra, contended that the Hindú law was clearly opposed to the alienation by a coparcener of his undivided interest in the joint family property; that one of the cases cited was a mere *dictum,* and that the general current of authorities was certainly the other way: *Vyavahára Mayúkha,* Chap. IX., § 2; 1 Stra. H. L. 261; 2 Stra. H. L. 433, 451; T. L. Strange's Manual H. L., Tit. *Alienation,* § § 155, 158.

PER CURIAM (COUCH, C. J., NEWTON and WARDEN, JJ.)—Upon the authorities we hold that, on this side of India, a member of an undivided Hindú family cannot, without the consent of his coparceners, make a gift of his share in the undivided property, or dispose of it by will.

We, therefore, affirm the decree of the lower court with costs.

Decree affirmed.

NOTE.—An undivided member of a Hindú family cannot sell a portion of the ancestral estate, even if falling within the limits of his individual share, unless under emergent circumstances, and with reservation of the share of his sons, and a sufficiency for the maintenance of his wife and daughters. *Ramakuttu Aiyar* v. *Kulatturaiyan,* Mad. S. D. A. Dec. for 1859, p. 270; *Rama Pillai and others* v. *Sreerangam Pillai and others,* Mad. S. D. A. Dec. for 1860, p. 49; *Kanakasbhaiya Pillai* v. *Sesbachalu Sastri, Ibid.* p. 17; *Sundra Pillai* v. *Tegaraja Pillai, Ibid.* p. 67.—See *Mayne's Digest of Cases,* appended to *Strange's Hindu Law, 4th ed.*—ED.

Special Appeal No. 826 *of* 1865.

VISHVANA'TH GANGA'DHAR ..... } ...*Appellant.*
KRISHNA'JI GANESH and others ..... *Respondents.*

Hindú law——Re-union after Partition (Samsrishta).

Held that re-union must be made by the parties, or some of them, who made the separation. If any of their descendants think fit to unite, they may do so; but such a union is not a re-union in the sense of the Hindú law, and does not affect the inheritance.

1866. Dec. 19. S. A. No. 826 of 1865.

THIS was a special appeal from the decision of C. B. Izon, Acting Assistant Judge of the Konkan, in Appeal Suit No. 179 of 1865, affirming the decree of the Munsif of Bhivandi in Original Suit No. 21 of 1865.

Gangádhar, Ganesh, and Káshináth, sons of Bálkrishna-bhat, who were full brothers constituting an undivided Hindú family, separated in food, worship, and estate, after which they all consecutively died, without any re-union having taken place between them.

The three brothers, before separation, had been in joint possession of certain land inherited by them from one Mahádev, deceased.

Each of the three brothers left sons; and Vásudev, the son of Káshináth, dying first, and without leaving any issue surviving him, Krishnáji and Rámchandra, the sons of Ganesh, took possession of the whole of the one-third share of the estate of Mahádev, which Vásudev had inherited from his father, Káshináth: alleging that they were the heirs of Vásudev, as having been in a state of re-union with him before his death, and having performed his funeral ceremonies.

The special appellant, Vishvanath, the son of Gangádhar, then brought the original suit: seeking to recover from the sons of Ganesh a half share of Vásudev's one-third of the land inherited from Mahádev.

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The Munsif threw out the claim, finding that the defendants were the heirs of Vásudev, and that they had re-united with him.

On appeal, the Acting Assistant Judge laid down the following (among other) issues: (1) whether Vásudev and respondents were shown to have become united again, or not; (2) if they were re-united, then is plaintiff also, by Hindú law, Vásudev's heir, or not.

On the first issue he recorded as follows:—

"The plaintiff, in his examination, admitted the fact of defendants and Vásudev being united—this being given as a reason why defendants' and Vásudev's shares of Mahádev's estate had not been divided. * * *. I find, on plaintiff's own admission, that re-union had taken place between Vásudev and respondents.

"In Sir T. Strange's Hindú Law, Chapter 9 (*a*), it is stated: 'A re-united parcener dying while the re-union continues, leaving no issue, but a widow, according to the Mitákshará (*b*), she is entitled to maintenance only, the deceased's share vesting by survivorship in his coparceners;' and the whole doctrine of re-union (Samsrishta) is explained in Chap. IV., Sec. IX. of the Vyavahár Mayúkha. From this it clearly results that the re-united coparceners will succeed to the estate of a deceased re-united member.

"The following passages seem particularly to bear on the point:—Yádnyavalkya's opinion in clause 5; * * *; the opinion of Brihaspati in cl. 4; and cl. 15 and 16 [of the Vyavahár Mayúkha] (*c*). On the whole I believe there is no doubt that by Hindú law, when re-union has taken place,

(*a*) 1 Stra. H. L. 234. (*b*) Mit. ch. II., Sec. IX., 4.—See also *Yádnyavalkya*, 3 Dig. 507, 476; *Vasishta*, Id. 477; *Váchespati Misra*, Id.

(*c*) The paragraphs of the Mayúkha above referred to have no bearing on the present case. The text of *Brihaspati* in para. 4 has reference to the *profectitious* acquisitions of re-united brethren; and paras. 5, 8, 15, and 16 to the succession after re-union of uterine brothers and sons.—ED.

on the death of a re-united coparcener, the remaining coparceners will inherit in preference to other relatives.

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"I therefore find on the second point that plaintiff is not Vásudev's heir."

The special appeal first came on for hearing on the 18th of June 1866, before COUCH, C.J., and NEWTON, J.

Vishṇu Moreshvar for the appellant.

Pâṇḍurang Balibhadra for the respondent.

The Court referred the case to the lower court, in order to determine who were the persons by whom the separation was made, and in what relation they stood to each other; and the then Acting Assistant Judge, S. H. Phillpotts, recorded as follows :—

"My finding on the issue :—That the father of the parties in this case, and Vásudev's father, were the persons who made the separation, namely, Gangádhar, appellant's father, Gaṇesh, respondent's father, and Káshináth, father of the deceased Vásudev. That the persons who made it were own brothers, namely, sons of Balkrishṇabhaṭ; but that there is no proof of re-union on the part of Káshináth, father of Vásudev, with either of the brothers; but that Vásudev, at the time of his death, re-united with Gaṇesh; but whether his father was living at the time or not is not proved.

"In this case the only proof about re-union or otherwise of either of the brothers is the examination of plaintiff, in which he admits the property and person [of Vásudev] were united with Gaṇesh, respondent's father; but whether that was before or after Káshináth's (Vásudev's father's) death is not proved; the witnesses merely state that the fathers of plaintiff, defendant, and Vásudev were separate, being own brothers."

Cur. adv. vult.

COUCH, C. J. :—The plaintiff in this suit (the special appellant) sought to recover a half-share of certain land the estate

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of Vásudev, deceased, which Vásudev had received as one-third share of Mahádev, deceased.

The fathers of the plaintiff, of Vásudev, and of the defendants (the special respondents) were brothers and an undivided Hindú family; and it has been found by the Acting Assistant Judge, upon the case being referred back by this court, that they separated.

The defendants resisted the claim, on the ground that they were re-united with Vásudev, and on his death performed his funeral ceremonies.

The Munsif gave judgment for the defendants, on the ground that they were the heirs of Vásudev, because they had re-united with him.

On appeal, the Acting Assistant Judge found, on the plaintiff's own admission, that re-union had taken place between Vásudev and the respondents; and confirmed the Munsif's decree.

Another Acting Assistant Judge has now, on the case being referred back, found that there is no proof of re-union on the part of the father of Vásudev with either of the brothers, but that Vásudev, at the time of his death, was re-united with Ganesh, the father of the respondents; and he appears to base this finding (as the former Acting Assistant Judge did) on the admission made by the plaintiff in the original suit. It is not necessary for the decision of this appeal to ascertain which of these findings is correct.

The question we have to determine is, whether by Hindú law it was necessary, in order to alter the course of inheritance, and deprive the plaintiff of a share in Vásudev's property, that the re-union should be made by the parties who separated.

There is little to be found in Hindú law-books on the subject of re-union, and scarcely any reported cases in the courts bearing upon the subject. In *Tarachand Ghose* v. *Padam Lochan Ghose* (*a*) it was considered, and it was held that where re-union has taken place among

(*a*) 5 Calc. W. Rep., Civ. R. 249.

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certain members of a Hindú family after partition, the members of the re-united family and their descendants succeed to each other, to the exclusion of the members of the branch not re-united.

This effect of re-union is important in considering in what cases it is allowable, as it does not merely affect the interests of the parties to it. We proceed, then, to consider in what cases there may be such a re-union.

In 1 Strange's Hindú Law, 233, it is said: "Not only may an original partition be re-formed by means of a supplemental one, but there may be an entirely new one upon a re-union of any of the separated parceners, competent to the purpose, and this, as well after partition by a father, as among co-heirs."

Sir Francis Macnaghten, in his Considerations on Hindú Law, p. 107, says: "After separation, and a partition actually made, families may be again united. This, however, is an event which seldom happens. I do not know an instance of it, and the Supreme Court's Pandits inform me that none has ever fallen within their knowledge."

In the *Mitákshará* on Inheritance, Chap. II., Sec. IX., 3, it is said: "That (re-union) cannot take place with any person indifferently; but only with a father, a brother, or a paternal uncle: as Vrihaspati declares. 'He, who, being once separated, dwells again through affection with his father, brother, or paternal uncle, is termed re-united."

In the *Vyavahár Mayúkha*, Chap. IV., Sec. IX., 1, there is this passage: "Now we proceed to expound the doctrine of re-united coparceners. On this subject, Vrihaspati defines re-union: 'He who, being once separated, dwells again, through affection, with his father, brother, or paternal uncle, is termed re-united.' This re-union, according to the Mitákshará and others, can only take place with a father, brother, or paternal uncle, not with others, because no others are included in the text. But the proper sense is, that this [re-union] arises even from the joint location of the makers of the [first]

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partition. For the words father, and the rest, are merely as a part to denote the whole, of the persons who make the partition, after the example, 'He measures the altar, half within, and half without:' otherwise, there would be a division of the text itself [into three]. Hence, re-union may take place with a wife, a paternal grandfather, a brother's grandson, a paternal uncle's son, and the rest also. 'He who, being once separated [from the co-heirs] dwells again [in common, is termed] re-united:' from joint location [of such an one], the sense of separated brothers, [one's own] sons, and the like, does not result." This author differs from all others in his doctrine.

In the *Dáya-Bháya*, Chap. XII., 4, after quoting *Vrihaspati*, it is said: "A special association among persons other than the relations here enumerated, is not to be acknowledged as a re-union of parceners: for the enumeration would be unmeaning."

The following passages from the *Dáya-Krama Saṅgraha*, Chap. V., show what the author understood by the term "re-united" in *Vrihaspati*. After quoting the passage, he says—

"3. Therefore where a person has been once disunited from his father and the rest;—afterwards the former partition is annulled by mutual consent of the separated parties, and in consequence of an agreement being concluded to the following effect, 'the wealth which is thine is mine,—that which is mine is thine,' they resolve on dwelling in the same abode. This is considered re-union.

"4. Here, since the father and the others are particularly specified, re-union takes place with those who are alone described, and not with nephews and the rest who are not named; otherwise the specific mention of father and the others would be unmeaning. Such is the opinion according to the Dáya-Bhága.

"5. The followers of the Maithila school are of opinion, that the use of the term father, and the rest, is figurative, and that re-union takes place, when those, whose right to a share of the common property is established by their birth, re-associate,

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after having once separated: consequently that reunion can occur with nephews and the rest."

It appears to us that the meaning of the passage from *Vrihaspati* which is the foundation of the law is, that the re-union must be made by the parties, or some of them, who made the separation. If any of their descendants think fit to unite, they may do so; but such a union is not a re-union in the sense of the Hindú law, and does not affect the inheritance. Both the courts below having decided that the union in this case had disentitled the plaintiff from succeeding to any part of the property claimed, we must reverse their decrees; and remand the suit for a re-trial. Although no other defence was set up, the value of the share claimed by the plaintiff has not been ascertained.

The costs of the suit, including this appeal, will abide the result.

Decree reversed and suit remanded.

Special Appeal No. 804 *of* 1865.

KESHAVBHAT bin GANESHBHAT ....*Appellant.*
BHA'GI'RATHI'BA'I kom NA'RA'YANBHAT....*Respondent.*

Endowment of Hindú temple—Annual stipend—Sharers—Hindú female—Act XI. of* 1865—*Jurisdiction.

In a suit by the widow of one of the descendants of the grantee of a *varshásan*, or annual allowance,—paid from the Government treasury for the performance of religious service in a Hindú temple,—to recover arrears due to her husband's branch of the family from another descendant, who had received the whole stipend; and where it was found by the court below, that by the usage of the family the duties of the office had been performed in rotation, and the stipend distributed amongst the descendants of the grantee in certain fixed proportions:—

Held that it was not competent to the defendant (the special appellant) to raise the question of the non-divisibility of the *varshásan*.

Held, also, that this was not a suit for money due on a contract, or "for personal property," or otherwise, within the meaning of Sec. 6 of Act XI. of 1865, cognisable by a Court of Small Causes in the Mofussil.

Quære, Whether the appropriation of an annuity which is in the nature of a religious endowment as private property is justified by Hindú law.

Quære, Whether a Hindú female is competent to perform, either in person or vicariously, the services for the maintenance of which a religious endowment has been granted.

1866. July 5. S. A. No. 804 of 1865.

THIS was a special appeal from the decision of F. D. Melvill, Assistant Judge of the Puná District, in Appeal Suit No. 267 of 1864, reversing the decree of the Munsif of Puná in Original Suit No. 116 of 1863.

The case was argued before TUCKER and GIBBS, JJ.

Páṇḍurang Balibhadra for the appellant.

Ganesh Hari Patvardhan for the respondent.

The facts are fully stated in the judgment of the Court, which was this day delivered by

TUCKER, J.—The plaintiff, the widow of one Náráyaṇbhaṭ son of Bábúbhaṭ, brought this action to recover two sums of Rs. 32-8-0 and Rs. 16, total Rs. 48-8-0, to which she alleged she was entitled as a sharer in a *varshásan*, or annual allowance paid from the Government treasury to the defendant for the maintenance of certain religious services at the temple of Mahádev at Baṇeshvar, near Puná.

It was stated that the allowance was originally granted to one Rámkrishṇabhaṭ, and descended to his four sons, Gaṇeshbhaṭ, Bálábhaṭ, Bábúbhaṭ, and Bhikambhaṭ, who discharged the duties for the performance of which the allowance was granted, in rotation, and shared the allowance in certain fixed proportions for each year of service and of non-service: That the plaintiff represented one of the three sons of Bábúbhaṭ, who had separated from his brethren and the other branches of the family, and was entitled to the same portion of the allowances which her husband would have received had he lived, namely, Rs. 32-8-0 for the year, Shake 1783 (A.D. 1861-62), in which the duties devolved upon Bábúbhaṭ's branch of the family, and Rs. 16 for Shake 1784 (A.D. 1862-63), when no services on the part of that branch of the family were necessary.

The defendant answered that plaintiff, being a woman, could not perform any of the services for which the annuity was granted; and as she discharged none of the duties in

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1783, she was not entitled to any share of the allowance. That the said allowance had been continued by Government in his sole name, and for his lifetime; and, being in the nature of an endowment for a temple, the other descendants of the original grantee were not entitled to share in it. He also raised a question of jurisdiction, namely, that the claim, being for a money debt alleged to be due to the defendant, was only cognisable by a Small Cause Court.

The Munsif of Puná rejected the plaintiff's claim, as he considered that she had not established any right to share in the allowance, which had been continued by Government to the defendant personally, for the maintenance of certain religious services in the temple.

On appeal, the Assistant Judge of Puná, Mr. Melvill, found that the suit had been properly brought in the Munsif's court; that the allowance belonged to the entire descendants of the original grantee, and was distributable amongst them; and that the plaintiff, as the widow of a separated member of the family, was entitled to such portion as her husband would have received during his lifetime; that in the year 1783, when the term of the service devolved on the branch of the family of which she was a member, the duties had been performed by her son, who was then alive, but has since died, and, subsequent to her son's illness, by her brother-in-law; and that, consequently, she was entitled to the sums claimed, which were the portions of the allowance which would have been payable to her husband or son, had they lived, according to the customary distribution in the family.

In special appeal it has been urged that a female cannot share in an allowance of this description, as she cannot adequately perform the services for which it is granted; either in person or by deputy; also, that such an allowance is not properly divisible among the descendants of the original grantee, but should be devoted to the temple of which i

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formed the endowment; further, that the suit was not brought in the proper court.

We consider that the suit has been brought in the proper court, and that it is not cognisable by a Court of Small Causes. It is not a claim "for money due on bond or other contract, or for rent, or for personal property, or for the value of such property, or for damages;" but it is a demand for the arrears of a certain stipend attached to a particular temple, and enjoyed by a particular family, which plaintiff alleges to be due to her in virtue of a right of inheritance derived from her husband and son.

It does not appear to us that the words used by the Legislature, in Sec. 6, Act XI. of 1865, which define the jurisdiction of Courts of Small Causes, include a claim of this description. It has been argued that the debt, if due at all, is due on account of an implied contract between the parties; but this proposition we think cannot be maintained, as the plaintiff's alleged right to share in the allowance is not founded upon any contract, express or implied. It has also been contended that an annual money payment from the treasury is personal property. We hold, however, that the meaning of the words "personal property" as used in Sec. 6 of the Act, previously quoted, must be limited to "chattels moveable," as it would seem from the sentences which precede and follow those words, that the Legislature did not intend to include under them, claims to money other than those which are distinctly specified in the statute. Using, then, the term "personal property" in the restricted sense which appears to have been given it in the Act, we consider that the present suit is not a claim to personal property, and that the question of jurisdiction has been rightly determined in the lower appellate court.

With respect to the other points raised in special appeal, we consider that, as it has been clearly found in the lower court, that it has been the custom in the family to perform the duties which attach to the office in rotation, and to

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distribute the stipend among the descendants of the original grantee in fixed proportions, it was not competent to the defendant, in answer to a claim brought by the legal representative of another coparcener, for arrears which had accrued due, to raise the question of non-divisibility.

As the annuity paid from the treasury appears to partake of the character of a religious endowment, it may be a question whether the appropriation of it as private property by the descendants of the original grantee, is an act justified by Hindú law, although, from the number of suits similar in character to the present one, which are brought in the Civil Courts in this presidency, it would seem probable that the proceeding is sanctioned by general custom. But, however this may be, the issue does not legitimately arise in the present suit; and can properly only be determined when some member of the community, who may be beneficially interested in the endowment, shall bring an action against the managers for the time being, or against the entire body of trustees, for a misapplication of the trust property.

Finally, with respect to the objection, that a Hindú female cannot perform the duties which attach to the office for the maintenance of which the allowance was granted, it may be observed that the defendant has not proved the existence of any usage in conformity with his allegation.

It has also been found as a fact that in Shake 1783, the last year in which the turn of duty devolved on plaintiff's branch of the family, the plaintiff's son was alive, and performed during a portion of the year the required services, which were continued after his illness and death by the plaintiff's brother-in-law. The defendant's pleader has not been able to inform the court of the precise date of the death of the plaintiff's son; but, from what has been disclosed, it is but fair to conclude, that the arrangements for worship during the said year were made by the plaintiff's son; and, as no interruption is alleged, it may be considered established

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that all that was necessary was done during that year, while in the following year the obligation to perform the service fell upon another branch of the family.

Under these circumstances, we consider that the defendant is not justified in resisting the payment of the arrears claimed in this suit, on the ground of the incompetence of the widow to minister in the temple, either in person or vicariously; and, without determining that point, which we consider does not arise in the present suit, we affirm the Assistant Judge's decree so far as it awards the payment of the said arrears, and order that the special appellant pay all the costs of the special appeal.

ORDER:—The Court confirm the decree of the Assistant Judge so far as it awards the payment of the money claimed and costs to plaintiff; but without prejudice to the defendant's right (if so advised) to raise the question of the competence of a Hindú female to perform, either in person or by deputy, the services for the maintenance of which the *varshásan*, or annual allowance, has been granted, in any fresh suit which may be brought by the plaintiff to share in the stipend in future; on which question the High Court by its present judgment has given no decision. All costs of special appeal on special appellant.

Decree affirmed.

Special Appeal No. 14 *of* 1865.

JAITA bin KA'LU.....*Appellant.*
BA'LU bin RA'GHU.....*Respondent.*

Abatement of Appeal—Respondent's objections—Act VIII. of 1859, *Secs.* 102 *and* 348—*Act XXIII. of* 1861, *Sec.* 37.

Where the special appellant died after the High Court had referred for trial, to the court below, an issue based upon objections taken by the respondent under Sec. 348 of Act VIII. of 1859 :—

Held that the appeal must abate, in accordance with Sec. 102 of Act VIII. of 1859 and Sec. 37 of Act XXIII. of 1861 ; and that the respondent cannot require that it should proceed, in order that he may have an opportunity of taking objections to the decree of the court below.

If the respondent desires to secure the right of asking for a decision on his objections, he must file a separate appeal.

1866. Nov. 12. S. A. No. 410 of 1865.

THE respondent, in this appeal, had filed a memorandum of objections, under Sec. 348 of Act VIII. of 1859 ; and the court had referred an issue founded thereon, for trial to the lower court.

The appellant since then had died; and no application had been made by any person claiming to be his legal representative that the appeal might proceed.

Dhirajlál Mathurádás, for the respondent, now asked that time might be allowed him to enter the names of the heirs of the appellant on the record.

NEWTON, J :—Act VIII. of 1859, Sec. 348, provides that "upon hearing of the appeal, the respondent may take any objection to the decision of the lower court which he might have taken if he had preferred a separate appeal from such decision." It is only, therefore, when an appeal comes to a hearing, that the respondent can avail himself of this provision.

In the present case, as the appellant is deceased, and no application has been made by any person claiming to be his legal representative that the appeal may proceed, the appeal cannot be heard, but must abate, in accordance with Sec. 102 of Act VIII. of 1859, and Sec. 37 of Act XXIII. of 1861.

1866. Nov. 12. S. A. No. 419 of 1865.

The respondent cannot require that it should proceed, in order that he may have an opportunity of taking objections to the decree of the court below. He should have filed a separate appeal, if he desired to secure the right of asking for a decision on such objections, irrespective of the contingency that the appeal filed by the opposite party might not come to a hearing.

WARDEN, J., concurred.

Application rejected.

Regular Appeal No. 8 *of* 1864.

COST FERNANDES ..... *Appellant.*

VA'SUDEV SHA'NBOG ..... *Respondent.*

Mutual dealings—Evidence of books—non-production—Limitation—Act VIII. of 1859, *Sec.* 170—*Act XIV. of* 1859, *Sec.* VIII.

In a suit for the balance of an account with interest in a case of mutual dealings between traders, where the High Court had directed the production of the defendants' books of account, and was satisfied, after receiving the report of the District Judge, that there were such books in existence, and that no satisfactory excuse for their non-production was given; and where the defendant had otherwise conducted his case in a very suspicious manner:—

Held (reversing the decree of the District Court) that the plaintiff was entitled to judgment, on a *primâ facie* case being made out by him; and that the suit as regards limitation came within the provision of Sec. VIII. of Act XIV. of 1859.

July 4. R. A. No. 8 of 1864.

THIS was a regular appeal from the decision of F. D. Melvill, Acting Judge of Honore, by whom the following judgment, in which the facts are stated, was recorded:—

"This action was instituted by Cost Fernandes to recover a balance of account—due on the 30th of November 1862 from Vásudev, on account of himself and the other defendants—Rs. 9,979-1-8.

"Vásudev replied that so much of the account as referred to more than three years before was barred by the Limitation

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Act; and that the lists of accounts produced by plaintiff are forgeries. He has had dealings with the plaintiff, and has every year up to 1860 given signed lists including the balance of the previous year. These lists have been suppressed by him. Vásudev's account books have been fraudulently taken by his coparceners. Nothing is due to plaintiff; but on the contrary he owes Vásudev a large amount. The others did not reply in time, and their petition to file answers afterwards was rejected by the Judge.

"The points at issue are—(1) are the accounts proved; (2) is any portion of the claim barred by the Statute of Limitation; (3) what amount is due to the plaintiff.

"The documents produced by the plaintiff, and on which he sues, are lists or rather memos. of the different items contained in the accounts of different years. These lists he says were furnished to him by Vásudev. He has not produced his own accounts, nor any distinct evidence to prove that Vásudev did make over these lists to him. He has, however, called a number of witnesses to prove that defendant Vásudev has virtually admitted the genuineness of these accounts. Several of these state that about a year and a half ago plaintiff and defendant were disputing about these accounts at the house of the former. This portion of the evidence is utterly valueless. I find from the statements of the witnesses that the memos. then produced by the defendant were original, and not copies. They could not, then, have been identical with those memos. now sued on, which had already been filed in court. I consider, moreover, that this evidence is open to very grave suspicion. In the first place, it is full of the most glaring discrepancies. In the second place, if the facts deposed to were established, plaintiff's story would be open to great objections. He admits that he had already received from defendant memos. of the items of the accounts between them. These memos. he states in his plaint to be incorrect and fraudulent. How,

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then, would he, after such memos. had been furnished to him enter into any negotiation about a settlement of accounts with defendant on the strength of other memos. furnished by him; or, if he had entered into such negotiation, would he not, on finding that these memos. were also incorrect, naturally at once refuse to have anything more to say to him, and allow the suit which he had filed to take its course. Instead of doing this, it is alleged that defendant was allowed to go away in order to correct the lists in which the latter said clerical errors might have crept. These considerations compel me to disbelieve the evidence of witnesses Nos. 28 to 33.

"Two or three witnesses have been examined to prove that in September or October last plaintiff's son and defendant Vásudev went to the house of Rozario, the then Sheristedár of the Judge's Court, in order to settle these accounts. Defendant had taken with him some memos. which were copies merely, and not originals, and he stated that they were copies of the lists which plaintiff had filed, and which he had obtained from the court. I am by no means satisfied with this evidence. The witnesses contradict each other on the question of the production of accounts by the plaintiff's son. Two of the three who have been examined did not apparently take defendant's memos. into their hands. They are not, therefore, qualified to state whether those papers were copies or not; and I cannot trust their memory sufficiently to believe them, when they state that defendant said they were copies. The evidence produced is then not sufficiently strong to establish the point that defendant did then, by the fact of his having taken copies of the memos. filed in court by the plaintiff, and having produced such copies in order to effect a settlement of accounts, virtually admit the genuineness of those memos.

"The last two witnesses called by the plaintiff are intended to prove that, about a year ago, Vásudev produced some memos. of accounts in the shop of one Ganpayá, in order to have his dispute with plaintiff settled. There is, how-

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ever, nothing to show that these were copies, and it may be presumed, therefore, that they were originals. The remarks that I have already made in regard to the original memos. said to have been produced by defendant in plaintiff's house apply equally to this portion of the evidence.

"Plaintiff has urged that defendant Vásudev has virtually admitted the claim, by failing to comply with a notice to produce his accounts. Vásudev, however, states that he could not produce them, as they were in possession of another defendant, Nelwalá.

"Vásudev has produced evidence which shows that memos. sued on are utterly opposed to the custom of the country. Several witnesses have stated that mutual trading is not carried on for very many years without accounts being balanced; that they are generally balanced every year, when the party against whom the balance is, gives a signed memo. to the other. He has also filed copies of a deposition made by plaintiff in another suit in October 1862 (one month before the present suit was filed), in which he stated that, though he had been called upon to produce the memos. of accounts given him by Vásudev, he could not find them all, and asked for time to produce them, and though that time was granted, he did not produce them.

"I consider that the facts brought forward by the defendant are in themselves sufficient to throw great suspicion on the claim. The evidence for the plaintiff, however, has utterly failed to prove the genuineness of the accounts. It may be here observed, as a curious feature in this case, and one not calculated to aid the plaintiff's cause, that instead of suing on his own account to recover the balance due, he has sued on accounts said to be furnished by the defendant, and which plaintiff himself impugns as incorrect and fraudulent.

"My finding on the first point at issue is that the accounts are not proved. No finding is required on the other points. I throw out the claim with costs."

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The grounds of objection taken to this decision on appeal to the High Court were as follow:—(1) That the Acting Judge misunderstood the nature of the case; (2) that he was wrong in refusing to admit evidence duly offered on behalf of the plaintiff, namely, his account books; (3) that his decision was contrary to the evidence recorded in the case; (4) that he failed in duly appreciating the evidence; (5) that he was wrong in not ordering the defendant's accounts to be produced when applied to by the plaintiff; (6) that he was wrong in assuming fabrication of documents, in the absence of all evidence to warrant the same.

The appeal first came on for hearing on the 22nd of March 1865, before COUCH and WARDEN, JJ.

Anstey, Reid, and *Nánábhái Haridás* for the appellant.

White and *Shántárám Náráyán* for the respondent.

PER CURIAM:—The case is referred back to the lower court, in order that such evidence upon the matters in dispute as may be furnished by the account books of the plaintiff or of the defendants may be taken and forwarded to this court, together with the District Judge's proceedings upon the application for a review of judgment made by the plaintiff, and the proceedings of the Principal Ṣadr Amín prior to those before the District Judge. Further hearing postponed.

The report of the District Judge, R. White, having been received, the hearing of the appeal was resumed on the 6th of December 1865.

Reid, Howard, and *Nánábhái Haridás* for the appellant.

O'Leary and *Shántárám Náráyan* for the respondent.

The Judge, it appeared, had only received in evidence the account books themselves, and had refused to take evidence of the handwriting of the entries therein, although he had been twice petitioned to do so.

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PER CURIAM:—Referred back to the District Judge, with the additional direction to receive the evidence of the witnesses mentioned in the petition of the 29th of May 1865, and any other witnesses who may be offered by either party to prove or disprove the genuineness of any account book or books, or to explain any entry or entries therein, or to show in whose handwriting or by whose authority any entry was made; and if no account books of the defendants shall be produced, to inquire into the reasons for their non-production and take evidence thereon, and to enforce the production thereof, if any such book or books appear to be in existence and capable of being produced; and to certify his proceedings herein within three months from this date.

The case was resumed for further hearing this day.

Reid, Howard, and *Nánábhái Haridas* for the appellant:—We now ask that judgment may be given against the respondent for refusing to produce the books: Act VIII. of 1859, Sec. 170, Act XXIII. of 1861, Sec. 37. We show that the books did exist; and the defendants have not accounted for their non-production.

Shántárám Náráyaṇ for the respondent:—I appear for Vásudev alone. The other defendants allowed judgment to go by default. The account sued on extends over a period of more than twenty years, from 1840 to 1862. The claim must be limited to three years previous to bringing the suit. The District Judge did not go into the question of limitation, as he held that the claim was not proved.

COUCH, C. J.:—In this case the plaintiff seeks to recover the balance of an account, alleged to be due by the respondent Vásudev, as manager for himself and the other defendants; and the nature of the transactions between the parties was such, that the plaintiff relied much on the defendant for vouchers and accounts of their mutual dealings.

The defendant Vásudev answered—1st, that the suit was barred by the law of limitation; and 2ndly, that the lists of

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accounts produced by the plaintiff were forgeries, and that he had suppressed those given to him.

We are clearly of opinion that the suit does not come within the limitation of three years. Sec. 8 of Act XIV. of 1859 appears to be intended for cases like this. The evidence taken in the case completely disposes of the allegation of forgery. It is not likely, in the first place, that the plaintiff would forge documents which he himself impugns as incorrect and fraudulent. If he had had recourse to forgery, he would probably have brought forward a much stronger case than he has done. It is important in a case like this to observe that the defendant with regard to the allegation of forgery has made an entirely groundless charge.

There are other suspicious features in the case set up by Vásudev. "Nothing (he says) is due to the plaintiff; but on the contrary he owes me a large amount." The generality of this allegation is in itself suspicious; and no proof has been offered in support of it. Then with regard to his books of account, his first statement on that subject, made on the 16th of January 1863, a month after this suit was brought, was that his account books were fraudulently taken away by his coparceners. But of that he has produced no evidence; and he now gives quite a different excuse for the non-production, namely, that one of the other defendants had kept and written the books.

There are thus most serious objections to the way in which the defendant's case has been put forward, and great light would probably be thrown on the dispute by the production of the defendant's books. The plaintiff had undoubtedly a right to have those books produced, and to extract evidence from them. In a case like the present the books of the defendants would afford the most valuable evidence that could be produced, namely, admissions in writing made by the defendants at a time when there was no dispute regarding the mutual dealings between the parties. And as

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we have come to the conclusion on the evidence that the non-production of the books has not been satisfactorily accounted for, we may safely also conclude that they would be evidence in favour of the plaintiff's case, if they were produced.

Our view on this point is strengthened by the provision of Act VIII. of 1859, Sec. 170; and although it is not necessary for us in the present case to give judgment under that section, we certainly might do so under the circumstances.

We have come to the conclusion, in the absence of any satisfactory evidence to the contrary, and having in view the suspicious character of the defence, that the plaintiff sufficiently proved his claim.

We, therefore, reverse the Acting Judge's decision, and award to the plaintiff the amount claimed, Rs. 9,979-1-8, with interest on Rs. 6,841, at 6 per cent. per annum, from the 26th of February 1863 (the date of the institution of the suit) until payment; with costs.

Decree reversed.

Appeal No. 3 *of* 1866 *under Act XX. of* 1864.

VALLABHDA'S HIRA'CHAND and another ...*Appellants.*
GOKALDA'S TEJIRA'M .....*Respondent.*

Bombay Minors' Act, Secs.* 6, 9, 10, 16, *and* 24—*mistake in copying Bengal Act—Inventory.

***Held* that persons appointed Administrators to a minor's estate under Sec. 6 of the Bombay Minors' Act (No. XX. of 1864) are not liable to furnish an inventory and accounts under Sec. 16 of the Act.**

Suit v. Ap. No. 3 of 1866 under Act XX. of 1864.

LI'LA'DHAR NANDRA'M died, leaving him surviving two sons, who were minors, to whom he left his estate; having by an instrument in writing appointed the appellants and two other persons to administer the estate.

The appellants applied for and obtained a certificate of administration from the Judge of Puná, under Sec. 6 of the

1866. July 9. Ap. No. 3 of 1866 under Act XX. of 1864.

Bombay Minors' Act (No. XX. of 1864);—the other two persons who had been appointed under the instrument not objecting.

Some time after the grant of this certificate the respondent, Gokaldás Tejirám, who was the father-in-law of one of the minors, applied to the District Judge of Puná to call upon the appellants to furnish an inventory and accounts under Sec. 16 of the Act; and the Judge granted the application.

Against this order the appellants, Vallabhdás and Nagardás, applied to the High Court, on the ground that it was not competent for the Judge to issue the order under the Act.

Ganpatrav Bhaskar, for the appellants, referred to *Mudsudan Sing* v. *The Collector of Midnapore and others*, decided in the High Court at Calcutta on the 8th of January 1863.

Bhairavanáth Mangesh for the respondent.

Couch, C.J.:—In this case the question is whether the Judge was right in making the order under Sec. 16 of Act XX. of 1864.

The persons to whom the administration was granted are two of those who were appointed administrators of the estate of the deceased under an instrument in writing. The other two did not come forward.

The certificate of administration was granted under Sec. 6; and the Judge's order was made under Sec. 16, which says: "The Public Curator and every other administrator to whom a certificate shall have been granted under Sec. 10 shall, within six months from the date of the certificate, deliver in Court an inventory of all the immoveable property belonging to the minor, and of all such sums of money, goods, effects, and things as he shall have received on account of the estate, together with a statement of all debts due by or to the same."

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'*Sec.* 10' referred to in Sec. 16 appears to have been retained by mistake for *Sec.* 9, in consequence of the Bombay Minors' Act having been copied from the Bengal Minors' Act (No. XI. of 1858), Sec. 10 of which corresponds with Sec. 9 of the Bombay Act. Sec. 10 of the Bombay Act does not at all refer to the granting of a certificate. A similar mistake occurs in Sec. 24 of the Bombay Act.

Sec. 16 therefore refers to Public Curators and others who are appointed under Sec. 9 (*a*). It does not refer to persons like the appellants, who derive their right to have the charge of the minors' property under an instrument in writing. The appellants have been entrusted with that duty, by the deceased himself. There are very good reasons why Public Curators and others referred to in Sec. 9 should be kept under the control of the court.

The Judge, therefore, was wrong in applying Sec. 16 to the appellants; and we accordingly reverse his decision.

NEWTON, J., concurred.

Appeal allowed.

(*a*) "Sec. 9. If the estate of the minor consists of moveable property, or of houses, gardens, or the like, the Court shall grant a certificate to the Public Curator appointed under Sec. 19, Act XIX. of 1841; or, if there be no Public Curator, to any fit person whom the Court may select for the purpose."

Referred Case.

ATMA'RA'M GULA'BRA'I v. AMI'RCHAND RUPCHAND.

Validity of bond subsequently stamped——Acts XXXVI. of 1860 and X. of 1862——Act VIII. of 1859, Secs. 39, 129, and 130——Reg. XVIII. of 1827.

A bond stamped subsequently to the institution of the suit is valid, under the provisions of the Civil Procedure Code and of the Stamp Acts of 1860 and 1862: provided it be properly stamped when produced at the first hearing of the suit, and when the Court is asked to receive it in evidence.

1860. July 16. Referred Case.

CASE referred for the decision of the High Court by the Acting Assistant Judge of Ahmednagar, under Sec. 28 of Act XXIII. of 1861.

"On the 2nd of May 1861, Atmárám Gulábrái filed a suit in the court of the Munsif of Yeolá, for the purpose of recovering a sum of Rs. 300, alleged to be due by deceased Rupchand, represented by his son and heir, Amírchand, on a bond dated the 2nd of January 1854. As the bond was not written on stamped paper, Atmárám paid to the Munsif the proper amount of stamp duty and the penalty; and it was subsequently stamped on the 4th of January 1862.

"On the 3rd of December 1861 the Munsif held, under the precedent afforded by the decision passed under date the 22nd of July 1854, by the late Ṣadr Diváni Adálat, in Special Appeal No. 3116 (*a*), that the bond, which was stamped subsequently to the date of the institution of the suit, was not admissible as evidence; and rejected the claim.

"Atmárám has preferred an appeal, urging that, under the provisions of Act XXXVI. of 1860, which took effect on the 1st of October of that year, the bond is valid.

"The point which I would beg to refer is, whether or not a bond stamped subsequently to the date of the institution of the suit is valid.

"The bond was written when Reg. XVIII. of 1827 was in force; and there is another ruling of the late Ṣadr Diváni

(*a*) 1 S. D. A. Dec. 82.

1866. July 16. Referred Case.

Adálat, besides the one quoted by the Munsif, No. 19 of special certified list, decided on the 4th of July 1856 (*b*). The provisions of Sec. 13 of Act XXXVI. of 1860 do not apply to the bond in question. I am, therefore, of opinion that it is invalid."

The case was heard before COUCH, C.J., and NEWTON, J.

PER CURIAM:—The question submitted to us in this case is, whether or not a bond stamped subsequently to the date of the institution of the suit is valid.

We are of opinion that the Code of Civil Procedure only requires the document to be properly stamped when produced at the first hearing of the suit, and when the Court is asked to receive it in evidence. This appears from the terms used in Sec. 130 of Act VIII. of 1859, and in cl. 4, Sec. XIII. of Act XXXVI. of 1860, and also in cl. 1, Sec. XVII., of Act X. of 1862.

The decisions of the Sadr Court, which were made before the Code of Civil Procedure came into operation, are not applicable. Sec. 39 of the Code does not require the Court, on the presentation of the plaint, to inspect the exhibit, as in Sec. 129, but only to mark the document for the purpose of identification, and to examine and compare the copy with the original.

But although the bond in this case might have been stamped subsequently to the institution of the suit, it was necessary that it should be stamped under Reg. XVIII. of 1827, which apparently had not been done.

(*b*) 1 S. D. A. Dec. 133.

Special Appeal No. 115 *of* 1866.

M. G. PENDSE.....*Appellant.*
R. S. MA'LSE .....*Respondent.*

Stamp——Discretion——Appeal.

In determining the stamp required for any particular instrument, regard must be had to the real nature of the instrument, and not to the title which may have been given to it by the parties, if the contents of the instrument show that the title is a misnomer.

The discretion vested in a Court of Justice must be exercised in a sound and reasonable manner; and a capricious and unreasonable exercise of discretion on the part of a court of first instance, is an error in law, which it is the duty of an appellate court to correct.

1866. July 30. S. A. No. 115 of 1866.

THIS was a special appeal from the decision of R. H. Pinhey, Judge of the Konkan District, in Appeal Suit No. 51 of 1866, confirming the decree of the Munsif of Pen, in Original Suit No. 663 of 1865.

The original suit was instituted by Rámchandra Mahádev A'gáshe, as agent of the appellant, Mádhavráv Ganesh Pendse, to recover from Raghunáth Sakhárám Málse possession of certain landed property mortgaged by him to the plaintiff. The grounds of action set forth in the plaint were: that the defendant had mortgaged the said property for Rs. 795, under a bond dated the 7th of Bhádrapada Vadya, Shake 1784; that he subsequently borrowed more money from the plaintiff under a second bond; that on the 13th of Pausha Vadya, Shake 1785, the parties came to a settlement, and the defendant executed a bond to the plaintiff with possession; and that, although the defendant was not entitled to receive any of the proceeds of the mortgaged property until the mortgage was redeemed, he did so in breach of his agreement.

Málse's defence was that the bond on which the plaintiff sued was not sufficiently stamped, under Act X. of 1862, Schedule A, 12; that the deed for Rs. 795, although a mortgage bond, was written on a deed of sale stamp, and was attested after it had been registered; that as the plain-

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tiff had not filed with his plaint the deed for Rs. 1,524-14-0, the defendant could plead nothing regarding it; that the deed was drawn up and signed, but it did not correspond with the terms agreed upon by the parties; that the deed was improperly registered at Puná, although the property mentioned therein was not situated in the Puná District; and that the plaintiff had fraudulently induced the defendant to sign the deed.

The Munsif of Peṇ rejected the claim, with costs, on the grounds: that the deed No. 13 produced by plaintiff, being for Rs. 1,525-14-0, and being stamped with an eight rupees' stamp, was insufficiently stamped, under the provisions of Act X. of 1862, Schedule A, 12, whereby a ten rupees' stamp was requisite; and that, although the plaintiff applied to the court to receive the amount of stamp duty that was deficient, and the usual penalty, under the provisions of Secs. 15 and 17 of the Stamp Act, the application should not be granted: as the conditions mentioned in those sections did not exist in this case.

Pendse then appealed to the District Judge on the grounds: (1) that the document No. 13 was on a proper stamp; and (2) that if the Munsif held that the document in question was insufficiently stamped, he ought to have allowed the appellant to pay the necessary stamp duty and the penalty under Sec. XVII. of Act X. of 1862.

On the 15th of February 1866, the District Judge recorded the following judgment:—

"The issues for decision are: (1) Is the document No. 13 sufficiently stamped; and (2) If not, should plaintiff be now allowed to make up the deficiency, under the provisions of Sec. XVII. of Act X. of 1862.

"My finding on the first issue is in the negative, and for the defendant. The document No. 13 bears an eight rupees' stamp. It is contended for the plaintiff that the document No. 13 is a composition deed, and is therefore sufficiently stamped, under Act X. of 1862, Appendix A, 12. It is urged that 'composition deed' is rendered *todjodichá*

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dastáivaj in the translation of the Act made by the Oriental Translator to Government; and that as the document No. 13 commences with these Maráthí words, therefore it must come under the operation of Act X. of 1862, Appendix A, 22. But in determining the nature of the document No. 13, it is not necessary for the Court to consider whether the Oriental Translator's rendering in Maráthí of the words 'composition deeds' is correct or not; nor can the insertion of the words *todjodichá dastáivaj* in the deed determine the amount of stamp duty which the deed ought to bear, unless the rest of the deed is consistent with those words.

"A composition deed such as is contemplated by Act X. of 1862, Appendix A, 22, is (speaking generally) a deed executed by one or more creditors to or in favour of a debtor, whereby the said creditors accept a composition amounting to less than their entire demand: Addison's Law of Contracts, 5th ed., p. 977; and the note to *Cumber* v. *Wane*, 1 Smith's L. C., 251. The document No. 13 is not a deed of this character. It is a deed of mortgage and conditional sale of property therein described, executed by the debtor to his creditor. It recites and supersedes other deeds previously executed for the amount of those deeds, *plus* some ready money advanced at the time of its execution. Therefore I am of opinion that the document No. 13 comes under the operation of Act X. of 1862, Appendix A, 46 and 12, and is insufficiently stamped.

"My finding on the second issue is also in the negative, and for the defendant. By cl. 1 of Sec. XVII. of Act X. of 1862, the Munsif was vested with a discretionary power in the matter. It was argued at the bar for the defendant that the words 'whose decision on the point shall be final,' in cl. 1 of Sec. XVII., precluded the appellate court from considering the point. But I think these words apply rather to the amount of stamp duty and penalty which a court may have ordered to be paid, than to the point now under consideration.

"I, however, refuse to overrule the Munsif's order on broader grounds. I am of opinion that when the law allows

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a court the option or discretion of doing one of two things, it is improper for an appellate court to interfere with the order made by such court, in the exercise of its discretionary power, if the order made is consonant with the law. I do not wish to be understood as thinking that the Munsif exercised his discretionary power wisely, nor that, if the point had been brought before me in the first instance, I should have refused, as the Munsif did, to receive from the plaintiff in this case the proper amount of stamp duty and penalty. I merely say that in the exercise of the discretionary power with which the law clothed him, the Munsif made a perfectly legal order; and, therefore, his order is not open to appeal. It is not the duty of the appellate court to take away from the Munsif the discretionary power with which the law invests him, and order him to do that which the law says he may or may not do, according to his discretion. To adopt any other course in this case would in effect be to substitute the fancies of one Judge for the fancies of another.

"The Munsif's order is unquestionably legal; and, therefore, were I to upset the Munsif's order, I should do so, not because it was wrong, but because my individual opinion, on a point which might be decided either way, happened to differ from that of the Munsif. I cannot think appellate courts exist for such a purpose, or to bring about results which must be uncertain, and which would vary with the idiosyncracies of various Judges.

"I confirm the decree of the Munsif with costs."

The grounds of objection taken to this decision in the memorandum of special appeal were as follow:—(1) that the District Judge held exhibit No. 13 insufficiently stamped, whereas it was sufficiently stamped as required by the law; (2) that the Judge has misconstrued the said exhibit, the composition deed in question, inasmuch as it has not been held to be a deed of composition within Art. 22 of Schedule A to Act X. of 1862, but a document within Art. 12 or 46 of the said Schedule; (3) that assuming the said exhibit to be insufficiently stamped, still the court of first instance having, notwithstanding the defendant's objections, already received

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it in evidence, the same court could not afterwards reject it: the District Judge was, therefore, wrong in confirming the order of rejection; (4) that supposing the court of first instance was right in questioning the admission of the document in evidence, after it had once been received by the same court, still the said court did not act properly in refusing to receive the additional stamp duty with the penalty, which were tendered by the appellant: the District Judge was, therefore, wrong in holding the order of rejection to be according to law; (5) that the exhibit having been rejected by the court of first instance, and being, therefore, out of the record for the purposes of the suit, the District Judge erred in not exercising his own discretion by allowing the document to be recorded in appeal, after receiving the stamp duty and penalty, if necessary.

The case was argued before TUCKER and GIBBS, JJ.

Shántárám Náráyan for the appellant:—The document did not require a stamp: it was a composition deed, and its object was to settle some old debts secured by mortgages and to define the respondent's liabilities; and it was none the less a composition deed, because it purported to keep alive a claim against the respondent secured by a mortgage; as such the stamp upon it of eight rupees was quite sufficient, under Act X. of 1862, Schedule A, Art. 22. Even if the document required a stamp, still the procedure of the court of first instance was illegal: because it assumed that the intention was to defraud the revenue; and it was not discretionary, as held by the District Judge, with the Munsif to receive or not to receive the deficiency of the stamp duty and the penalty: he was bound to receive them, unless it could be shown to his satisfaction that there had been an intention to defraud the revenue. Supposing that, under the circumstances, the Munsif had a discretion in the matter, and that his order was legal in itself, still the Judge erred in considering that he had no power to interfere with the exercise by the Munsif of his discretion, when he himself was not satisfied that there had been a sound and reasonable exercise of that discretion. Even the High Court, in special appeal,

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has so interfered in S. A. No. 211 of 1864. *A fortiori* could the District Court interfere in regular appeal, when it was invested with such a power as that given by Sec. 363 of Act VIII. of 1859, which provides a remedy on appeal for any error, affecting the merits, in an order passed in the course of the suit. Even if the Judge would not interfere with the Munsif's discretion, still he should have himself received the document with the deficiency of the stamp duty and the penalty, under Sec. 355 of the code,—the document being for that purpose not on the record. The Judge supposed that "discretion" was synonymous with "fancy," and overlooked Lord Coke's definition: *discretio est discernere per legem quid sit justum*, 4 Inst. 41; and also the language of Lord Mansfield in *R.* v. *Wilkes* (*b*).

Vishvanáth Náráyaṇ Mandlik for the respondent.—The document had been put in long before it was declared inadmissible by the Munsif. The plaintiff was bound to know the law; he should not have waited till the Munsif declared that the document required a stamp; it was then too late to offer the deficiency of the stamp duty and the penalty; he should have offered it when he brought the document into court—especially as the respondent had from the first, even before the document was recorded, taken the objection that it required a stamp.

Sháutárám, in reply.—The plaintiff had a right to have the question decided, whether or not the document required a stamp; he offered the deficiency of the stamp duty and the penalty when that question was decided. Where the High Court, in S. A. No. 967 of 1864, decided that a document required a stamp, and that it had been improperly received in evidence in the lower court, it remanded the case in order that the stamp and the penalty might be received.

TUCKER, J., in delivering the judgment of the Court, said:—Two points arise for consideration in this special appeal: 1st, whether it has been rightly held that the document (exhibit No. 13) was insufficiently stamped; and 2ndly, whether

(*b*) 2 Burr. 25, 39.

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the District Judge committed an error in law in ruling, that in matters in which the statute law has left a discretion to a court of first instance, an appellate court ought not to interfere with the order passed, although it may consider that the discretion exercised was neither reasonable nor just.

On the first point we concur with the District Judge and the Munsif. The deed in question, though erroneously styled a composition deed, is in reality a deed of mortgage; and the stamp which it required is regulated by clauses 46 and 12, Schedule A of Act X. of 1862, and not by cl. 22, Schedule A of the said Act.

In determining what provision of the stamp laws is applicable to a particular instrument, regard must be had to the real nature of the instrument, and not to the title which may have been given to it by the parties, if the contents of the instrument show that the title was a misnomer.

On the second point we consider the ruling of the District Judge to have been incorrect.

When the Legislature has not made any particular rule of conduct imperative, but leaves the procedure to be followed under particular circumstances within the discretion of a Court or Judge, it is intended that a sound and reasonable discretion should be exercised, and not that the matter should depend on the caprice or fancy of the court or individual in whom the discretion may be vested. "Discretion," to use the words of Lord *Mansfield* in the well-known case cited at the bar, "when applied to a Court of Justice, means sound discretion guided by law. It must be governed by rule, not by humour; it must not be arbitrary, vague, and fanciful; but legal and regular."

We hold that when a court of original jurisdiction exercises the discretion vested in it in an irregular and unreasonable manner, it is the duty of an appellate court to rectify its erroneous procedure. This point has already been decided in more than one case; and in S. A. No. 211 of 1864 it was ruled that an unreasonable order of an appellate court with respect to the apportionment of costs was an error in law, which could be corrected in special appeal.

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In the present instance, we concur with the District Judge that there was no good reason for the refusal of the Munsif to allow the plaintiff to pay into court the sum which the Munsif held to be deficient in the value of the stamp together with the prescribed penalty. The Munsif has not found that the neglect or omission to execute the instrument on the proper stamp arose from any intention to evade the payment of the stamp duty fixed by the Stamp Act; nor does there appear to be any ground for supposing that the plaintiff was actuated by any such motive.

We consider that, as a general rule, a Civil Court is bound to allow the defects in an insufficiently stamped deed to be made good in the manner which the law has provided, when there is no reason to suspect any design on the part of the holder to defraud the revenue; and that if it refuse the relief which it has power to grant, arbitrarily, and without assigning any good reason, as has been done in this case, it is the duty of the court to which an appeal lies from its decision to correct the error which has been committed.

It should be understood that we by no means wish to encourage a capricious and fanciful interference by superior courts in the acts of inferior tribunals, with respect to matters in which the law has left to the courts last named a discretionary power; but we consider that the District Judge has ruled erroneously in holding that it was incompetent to him, under any circumstances, to exercise any supervision in such matters, and that he was unable to afford a remedy, when the plain requirements of justice had been departed from, and no good reason had been stated for the deviation.

We, therefore, make the following decree:—

The Court reverses the decrees of the District Judge and of the Munsif; and returns the cause to the court of first instance. Let the Munsif receive the amount of stamp duty which is required to make the document (exhibit No. 13) valid, namely, two rupees *plus* the penalty of forty rupees, in all forty-two rupees; and proceed to decide the suit on its merits. Costs to be apportioned at the final decision.

Special Appeal No. 345 *of* 1866.

YELLA'PPA' bin BASA'PPA'.....*Appellant.*
MANTA'PPA' bin BASA'PPA'.....*Respondent.*

Vendor's lien for unpaid purchase money——Remand.

In a suit claiming possession of land, purchased by the plaintiff from the defendant, the Munsif threw out the claim for want of consideration; but the District Judge found that the plaintiff was entitled to have the land, and that the defendant might sue him for the purchase money:—

Held that the equitable doctrine of the vendor's lien for unpaid purchase money applied to the case; but, as the District Judge had not decided whether the defendant had succeeded in proving that the purchase money had not been paid, that the suit should be remanded for a finding by him on that issue.

1867. December 6. Referred Case.

THIS was a special appeal from the decision of C. F. H. Shaw, District Judge of Dharwar, in Appeal Suit No. 527 of 1864, reversing the decree of the Munsif of Sáundatti.

Mantáppá brought the original suit to recover from Yelláppá possession of certain fields, purchased from him by a deed of sale, dated the 11th of August 1863.

Yelláppá answered that the deed was obtained from him by fraud, and that the purchase money had not been paid; and the Munsif found that, though there was no fraud in the execution of the deed, it was void for want of consideration.

The District Judge decided as follows:—"Yelláppá has no right to plead non-payment as want of consideration. In his resignation (rázínámá) he admits the sale; and though he may sue Mantáppá for the purchase money—when he can prove non-payment—he cannot deny the sale, nor plead want of consideration. * * * Mantáppá to have the field: decree reversed with costs."

The case was heard before NEWTON and WARDEN, JJ.

Vishnu Moreshvar Kelkar for the appellant

Dhirajlál Mathurádás for the respondent.

NEWTON, J.:—This was a suit to recover property sold to the plaintiff by the defendant under a deed. The defendant pleaded fraud and want of consideration.

The Munsif held that there was no fraud, and that the usual rázínámá and kabuláyat for the transfer of the property

1866. December 6. Referred Case.

were given in to the revenue officers; and he might have added that the defendant was ready at the time to carry out the rázínámá. He found, however, that the purchase money had not been paid; and, therefore, rejected the claim.

On appeal, the District Judge of Dharwar reversed the Munsif's decision, on the ground that the deed of sale was duly executed by the defendant, whose acquiescence in the transaction was shown by the rázínámá.

The pleader for the respondent has endeavoured to support this judgment: arguing that a vendor has no right to withhold possession of property sold, because the purchase money is not paid. The case is, however, clearly one for the application of the doctrine of the vendor's equitable lien for unpaid purchase money.

In the leading case on this point, *Mackreth* v. *Symmons*, (*a*) Lord *Eldon* observes that, "where the vendor conveys, without more, though the consideration is upon the face of the instrument expressed to be paid, and by a receipt endorsed upon the back, if it is the simple case of a conveyance, the money, or part of it, not being paid, as between the vendor and the vendee, and persons claiming as volunteers, upon the doctrine of this court, which, when it is settled, has the effect of contract, though perhaps no actual contract has taken place, a lien shall prevail, in the one case for the whole consideration, in the other for that part of the money which was not paid."

The applicability of this settled doctrine is in no way affected by the further proceedings which the Munsif found that the plaintiff adopted to give effect to the sale. The material point for determination before the lower appellate court was the question, whether the defendant succeeded in proving that the purchase money had not been paid; and, in order that a finding may be recorded by the Judge on this issue, we reverse the decree and remand the case.

The costs of this special appeal will follow the final decision.

Decree reversed and suit remanded.

(*a*) 15 Ves. 329; 1 Wh. and Tu. L. C. Eq. 194.

Civil Petition.

Ex parte DHARAMDA'S BHAVA'NIDA'S.

Indian Registration Act (No. XX.) of 1866——Appeal.

Held that there was no appeal to the High Court from the decision of a District Court on a petition, under Sec. 84 of Act XX. of 1866, to establish the right to have a document registered; nor would the Court interfere with such a decision, under Reg. II. of 1827, Sec. v., cl. 2.

1866. November 22. Civil Petition.

THIS was an application to call for the proceedings, under Reg. II. of 1827, Sec. v., cl. 2, in consequence of the refusal of the District Judge of the Konkan to make an order, on the petition of the applicant under Sec. 84 of Act XX. of 1866, asking for a direction to the Registering Officer at Thána to have a certain document, produced by the petitioner, registered.

The petition was heard before COUCH, C.J., NEWTON and WARDEN, JJ.

Shántárám Náráyan for the applicant.

COUCH, C. J. :—Act XVI. of 1864, in Sec. 15, provides that if a District Registrar or Deputy Registrar shall refuse to register an instrument falling within the provisions of Sec. 13, it shall be lawful for any person interested to institute a regular suit, in order to establish his right to have such instrument registered. Under that provision there would have been an appeal, special as well as regular, as one of the incidents of a suit.

But that Act is repealed by Act XX. of 1866, which in Sec. 84 provides that, "if a Registrar or Registrar General shall under Sec. 82 make an order of refusal to register any document referred to in Sec. 29, or if a refusal to register shall have been made under Sec. 15 of Act XVI. of 1864, or if he shall under Sec. 83, on appeal, make an order of refusal to direct the registration of such document, it shall be lawful for any person claiming thereunder, his representative, assign, or agent authorised as aforesaid, within thirty days after the making of such order of refusal, to apply by petition to the District Court, in order to establish his right

1866. November 22. Civil Petition.

to have such document registered ;" and that " the Court may, if it shall think proper, and if the requirements of the law for the time being in force have been complied with on the part of the petitioner, so as to entitle the document to registration, order such Registrar or Registrar General to register the document, or to direct its registration, in the proper manner, and he shall thereupon obey such order, &c."

The new Act makes no provision whatever for an appeal to this court, except " when the officer presiding over the District Court shall himself as Registering Officer have made any order appealed against under this section," in which case it is provided that " the petition shall, within sixty days after the making of such order, be presented to the High Court, and the provisions contained in the former part of the section shall, *mutatis mutandis*, apply to such petition and the order (if any) thereon." Otherwise there is no provision authorising this court to order registration.

From the terms of this section it appears that the Legislature intended to alter the procedure, and to substitute a summary procedure for the regular suit and its incidents, which existed under the provision of the former Act. And were we to make the order that we are now asked under Reg. II. of 1827, Sec. v., cl. 2, to make, we have no power to carry out such an order. This of itself would be a sufficient reason for not interfering in such a case.

We cannot undertake to say that the High Courts at Calcutta and Madras have not such powers as are given to us by Reg. II. of 1827, Sec. v., cl. 2; but we have every reason to believe that they have not; and if it was not intended that those courts should have such powers, it is not likely that the exercise of such powers in this presidency was contemplated.

We are of opinion, therefore, that we have not only no power to interfere in a matter of this kind, but that even if we had the power we ought not to exercise it, since the Legislature has evidently intended that the decision of the District Court should be final.

Petition rejected.

Civil Petition.

RA'YASANGJI MA'DHAVASANGJI and another...*Applicants.*
THE EXECUTORS of DAYA'BHA'I .....*Opponents.*

Execution of decree—Parties—Setting aside.

D. M. brought a suit against C. D., described as the heir of D. V., and in 1838 obtained a decree to be satisfied out of the estate of D. V. In 1862 the executors of D. M.'s will applied to the Munsif's Court to have the decree executed against the estate of D. V., which was then in the possession of R. and others, C. D. having died; and R. and others resisted the application, on the ground that C.D., who alone had been made defendant in the suit, was not the heir of D. V. The Munsif rejected the application; but his order was reversed on appeal by the District Judge:—

Held that the Judge's order must be set aside on the grounds that C. D. was not the heir of D. V.; that neither he, nor his guardian on his account, was, at the date of the decree, in possession or enjoyment of the property against which it was sought to be executed; and that neither the heirs of D. V., nor any persons through whom they claimed, were parties to the suit in which the decree was passed.

1866. December 17. Civil Petition.

DAYA'BHAI MANCHARJI brought a suit on a mortgage bond against Chandarsang Dipsang, described as the heir of Dhirajsang Vakatsang, the mortgagor; and obtained a decree, in which it was ordered that the amount of the judgment, Rs. 4,607, be recovered from the estate of Dhirajsang Vakatsang.

In 1862 Dayábhái's executors sought to execute the decree against the estate of Dhirajsang, then in the possession of Ráyasangji and others, Chandarsang having died; and a notice issued from the court of the Munsif of Urpad, calling upon Ráyasangji and others to show cause why the decree should not be executed against the estate of Dhirajsang in their possession. Ráyasangji and his brother Himatsangji opposed the application, on the ground that Chandarsang, against whom alone the suit had been brought, was not the heir of Dhirajsang; and the Munsif, finding it to be so, refused to execute the decree.

1866. December 17. Civil Petition.

On appeal the Judge of Surat reversed the Munsif's order, on the 20th of January 1866.

Nánábhái Haridás, on the 26th of April, obtained a *Rule Nisi*, on behalf of Ráyasangji and his brother: calling upon the executors of Dayábhái to show cause why the order of the District Judge should not be set aside, on the grounds that the decree of the 13th of March 1838, of which execution was sought, was not obtained against any person who was the heir of Dhirajsang; and that the applicants, Ráyasangji Mádhavasangji and Himatsangji Mádhavasangji, were his heirs, and were not, nor was any person through whom they claimed, a party to the suit in which that decree was made. And the following order was made by the Court:—

"Let the District Judge ascertain and report, whether at the date of the decree now sought to be executed, the defendant Chandarsang, or his guardian on his account, was in possession or enjoyment of the property against which the said decree is now sought to be executed; and if not, who was in possession or enjoyment of the said property at that time; and if the said defendant, Chandarsang, was then in such possession or enjoyment, either by himself or guardian, let the District Judge ascertain and report whether the said defendant, Chandarsang, has since been deprived of such possession or enjoyment, and if so, when and under what circumstances, and whether he was the heir of Dipsang."

The report of the District Judge was as follows:—

"It appears, from an inquiry instituted into the points therein mentioned, that neither Chandarsang, nor his guardian on his account, was at the date of the decree passed by the Munsif of Urpád, namely, 13th of March 1838, in possession of the property against which the said decree is now sought to be executed. The said property, however, at the time referred to appears to have been in the possession of Dipsang's cultivator; and nothing seems to have been brought forward by the trustees of the late Dayábhái to show that Chandarsang was the heir of Dhirajsang."

1866. December 17. Civil Petition.

Shántárám Náráyan now (Dec. 17) appeared to show cause. It was only when notice was served on the persons in possession of the estate, and after Chandarsang had died, that it was alleged by the opponent—the other heirs did not show cause—that Dipsang was not the heir of Dhirajsang, but merely his foster son.

PER CURIAM (COUCH, C. J., NEWTON and WARDEN, JJ.):—In this case a person, who is not shown to have been the heir of the deceased mortgagor, was alone made defendant in the suit brought by the executors of the mortgagee; whilst other persons who claim to be the heirs, and who are now in possession, had no notice of the suit, until it was sought, several years after the decree was passed, to execute it against the estate.

The decision of the Munsif was right; and we, therefore, reverse the order of the Judge, but without prejudice to any right which the decree-holder may have to establish his claim against the estate of Dhirajsang by suit brought against his heirs.

Order reversed.

Civil Petition.

Ex parte NAGOVÁ kom JAKAN GAU'DÁ.

Dispossession of immoveable property—Civil and Revenue Courts—Jurisdiction—Reg. XVII. of 1827, *Chap.* VIII.—*Act XVI. of* 1838, *Sec.* 1—*Act VIII. of* 1859, *Sec.* 1—*Bombay Act No. V. of* 1864.

Held that the Civil and the Revenue Courts have concurrent jurisdiction to hear and decide suits in regard to immediate possession.

December 5. Civil Petition.

THE petitioner had been sued in the court of the Munsif of Saundatti by Mudiáppá bin Virpáksháppá, who sought to recover possession of certain immoveable property, of which he alleged that he had been unlawfully dispossessed; the suit having been commenced within six months from the time of such dispossession, in accordance with Sec. XV. of Act XIV. of 1859.

1866. December 5. Civil Petition.

Vishvanáth Náráyaṇ Mandlik for the petitioner.—By Bombay Act No. V. of 1864 this suit ought to be brought in the court of the Mámlatdár, and not in the court of the Munsif.

COUCH, C. J.:—Reg. XVII. of 1827, Chap. VIII. (extended by Regs. V. and VI. of 1830) gave exclusive jurisdiction to the Revenue Courts in the adjustment of the respective rights of parties, in cases which relate to land and its rent and produce.

Those powers were altered by Act XVI. of 1838, Sec. 1, by which it was enacted, in modification of the rules contained in Chap. VIII. of Reg. XVII. of 1827, that all suits in regard to tenures, and the nature and extent of the interest and advantage which in virtue thereof should be enjoyed by the parties concerned, and all suits in which the right to possession of land, or of the watans of hereditary district or village officers is claimed, shall be brought in the Courts of Adálat and the courts subordinate thereto, and not in the Courts of Revenue: Provided, nevertheless, that it shall be lawful for the Revenue Courts to give immediate possession of all lands, premises, trees, crops, fisheries, and of all profits arising from the same, to any party dispossessed of the same or of the profits thereof; provided application be made to them by such party within six months from the date of such dispossession.

By this Act the power of the Civil Courts to entertain all suits in regard to tenures &c., and all suits in which the right to possession of land &c. is claimed, was revived, the prohibition to hear such suits being thereby removed. And although the Bombay Act, No. V. of 1864, gives to Mámlatdárs the power to hear and decide suits in regard to immediate possession, it does not follow that the Civil Courts have no power to decide suits of the same nature. On the contrary, Sec. 1 of Act VIII. of 1859 (Civ. Proc. Code) declares that they shall have such jurisdiction, there being no Act of the Government of India, and no Regulation of the

1866. December 5. Civil Petition.

Bombay Codes, by which their cognisance of the suits, is expressly barred (*a*)

It appears to me, then, that, in cases like the present, the Civil and Revenue Courts have concurrent jurisdiction.

NEWTON and WARDEN, JJ., concurred.

Application rejected.

(*a*) "The Civil Courts shall take cognisance of all suits of a Civil nature, with the exception of suits of which their cognisance is barred by any Act of Parliament, or by any Regulation of the Codes of Bengal, Madras, and Bombay respectively, or by any Act of the Governor General of India in Council."

NOTE.—For other decisions relating to the jurisdiction of the Civil and the Revenue Courts in suits regarding rent, "right to possession of land," &c., see 2 Bom. H. C. Rep., 191—201.—ED.

Civil Petition.

R. V. KOSHTI .....*Applicant.*

NA'RA'YAN DHULA'PPA'.....*Respondent.*

Sale of immoveable property—objections for irregularity disallowed—illegal order by Judge on appeal set aside—Act VIII. of 1859, *Secs.* 256 *and* 257.

On application by the judgment debtor to the Principal Sadr Amín to set aside the sale by auction of a house, in execution of a decree, on the grounds of material irregularities in publishing and conducting the sale, from which the applicant sustained substantial injury: the objections were disallowed as untenable, and the sale confirmed. But the District Judge, on appeal, set aside the sale for a ground on which he had no authority to interfere.

On petition to the High Court by the purchaser of the house:—*Held* that the order of the Judge must be set aside as illegal; and the original order, confirming the sale, allowed to stand.

1866. December 3. Civil Petition.

THIS was an application to set aside, as illegal, an order passed on appeal by the District Judge of Ahmednagar, on the 28th of July 1866, by which the sale of a house was cancelled, after it had been confirmed by the Principal Sadr Amín.

The sale was held at Ahmednagar, on the 17th of January 1866, in execution of a decree against the respondent, Náráyan; and the petitioner was the purchaser.

1866. December 3. Civil Petition.

On application by Náráyaṇ to the Principal Ṣadr Amín to set aside the sale, on the ground of material irregularities, by reason of which he sustained substantial injury (Act VIII. of 1859, Secs. 256, 257), the objections were disallowed and the sale confirmed. The District Judge, on appeal, set aside the sale, on the ground that the officer conducting it ought to have received the amount of the judgment debt, which Náráyaṇ offered to pay, after the petitioner had been declared the purchaser, but before the sale was confirmed.

Vishvanáth N. Manḍlik (Nov. 4) obtained a *Rule nisi*, calling upon the respondent to show cause why the order of the District Judge should not be set aside, as being illegal, and the order of the Principal Ṣadr Amín, confirming the sale, allowed to stand.

Dhirajlál Mathurádás now (Dec. 3) appeared to show cause.—There is no appeal to this court, as the order passed on appeal by the Judge is final, under Sec. 257. [COUCH, C.J.:—The Judge did not set aside the sale on the ground of such an irregularity as is provided for by the Code, but for a totally different reason, for which there is no legal ground whatever.] Before the sale commenced, the defendant offered to pay the amount of the judgment. The plaintiff consented, and the defendant went to get the money; but before he returned the property was sold. The sale was hurried on, and the house was sold for a price much below its value. There was also an irregularity in publishing the sale, namely, that the house was described in the notification as containing 28 *khans* or compartments, whereas it contained 38 *khans*,—a misdescription by which the price must have been diminished.

Vishvanáth N. Manḍlik was heard in reply.

COUCH, C.J.:—The order passed by the Judge in this case must be set aside as entirely unauthorised.

As to the alleged misdescription in publishing the sale, it cannot be considered a material irregularity, such as would affect the price at which the house was sold: as the sale was

1866. December 3. Civil Petition.

conducted on the spot, where the premises were open to inspection. Moreover the Judge does not rely upon that ground in setting aside the sale, although the objection was brought to his notice.

As to the objection which the Judge allowed, there is no law which would authorise the officer conducting a sale to stop it, because the defendant offered to pay the amount of the decree to the plaintiff. And the court, executing the decree, is bound to confirm the sale; unless the applicant, who seeks to set it aside, shall prove that he has sustained substantial injury by reason of some material irregularity in publishing or conducting the sale.

The order of the Principal Sadr Amín was, therefore right; and the order of the Judge reversing it is set aside, as being illegal, with costs on the respondent.

NEWTON and WARDEN, JJ., concurred.

Rule absolute.

Regular Appeal No. 10 *of* 1866.

A'VA'BA'I, wife of Jámásji Jamshedji.....*Appellant.*
JA'MA'SJI JAMSHEDJI and another .....*Respondents.*

Act XV. of 1865——*Pársi Marriages*——*Bigamy*——*Divorce.*

A Pársi residing in Bombay, after the passing of Act XV. of 1865, but before it came into operation, contracted a second marriage, during the lifetime of his first wife, from whom he had not been divorced, and whom he, moreover, wilfully deserted for two years.

On appeal from an order by the Judge of the Pársi Chief Matrimonial Court, rejecting a plaint for divorce by the first wife, on the ground that the subject-matter of the plaint did not constitute a cause of action, under Sec. 30 of Act XV. of 1865, and Act VIII. of 1859, Sec. 32 :—

Held that the facts alleged in the plaint did not amount to "bigamy coupled with adultery," nor to "adultery coupled with wilful desertion," within the meaning of Sec. 30 of Act XV. of 1865 : as a second marriage contracted by a Pársi husband, during the lifetime of his first wife, was not unlawful before the Act came into operation; nor did the provisions of the Act in any way affect the validity or the consequences of such a marriage.

1866.
December 4.
R. A. No. 10
of 1866.

THIS was an appeal from the decision of NEWTON, J., sitting as Judge of the Pársi Chief Matrimonial Court at Bombay, rejecting a plaint presented by the appellant, in which she prayed that the marriage celebrated between her and the male respondent in A.D. 1857 might be dissolved, and a divorce granted, on the ground that her husband had committed adultery with the female respondent, Kharshedbái, and lived with her as husband and wife since the 30th of July 1865; and that he had, moreover, wilfully deserted the plaintiff for more than two years.

The order passed on the rejection of the plaint was as follows :—

"I am of opinion that the subject matter of this plaint does not constitute a cause of action. The suit is for a divorce on the ground of adultery coupled with desertion.

"The adultery is described as committed by marriage with another woman during the subsistence of the previous marriage with the plaintiff. The second marriage is thus by implication assumed to have been bigamous and void. I am unable to admit this assumption.

1866. December 4. R. A. No. 10 of 1866.

"By Sec. 4 of the Pársi Marriage and Divorce Act, 1865, it is provided that no Pársi shall *after the commencement* of that Act contract any marriage in the lifetime of his wife, except after his lawful divorce from such wife; and that every marriage contracted contrary to the provision of this section shall be void.

"This Act did not commence and take effect till the 1st of September 1865 (Sec. 53); and, therefore, did not make void the alleged second marriage of the defendant, Jámásji, which is stated to have been contracted on the 30th of July 1865.

"Nor can I admit the existence of any other law, or of any custom having the force of law, at the date of the said second marriage, whereby that marriage was made a nullity, and the intercourse between the parties to it rendered adulterous.

"In the case of *Merwanji Nusherwanji* v. *Avabai*, and the other cases referred to in the report of that case (*a*), it was found that second marriages among Pársis (the first wife being alive) were not strictly allowed without sufficient cause; but that such second marriages had been very numerous among members of the Pársi community, without any former precedent of the rigid enforcement of the penalties of the law, if any such existed. No question has been raised as to the correctness of that decision; and although second marriages among Pársis during the lifetime of the first wife have been frequent down to the date on which Act XV. of 1865 came into operation, no proceedings have been taken in the interval against the parties contracting them as chargeable on that account with bigamy or adultery."

The appeal came on for hearing this day before COUCH, C.J., TUCKER and WARDEN, JJ.

Jehángir Merwánji, for the appellant.—The plaint discloses two causes of action: (1) Bigamy coupled with adultery; (2) adultery coupled with wilful desertion for two years or upwards. Either is sufficient, under Sec. 30 of the Act, to support a suit for divorce. The customs of the Bombay

(*a*) 2 Borr. 231.

1866. December 4. R. A. No. 10 of 1866.

Párs is, which are quite distinct from those of the Mofussil, ought to govern the case, under Reg. IV. of 1827, Sec. XXVI., cl. 2.

COUCH, C.J.:—I am of opinion that the learned Judge was right in rejecting the plaint. There could be no adultery in the respondent's cohabiting with the second wife, if the marriage was not illegal. The second marriage in this case is alleged to have taken place on the 30th of July 1865, before Act XV. of 1865 commenced and took effect, which, by Sec. 53, was on the 1st of September 1865.

Now the preamble of the Act is—"Whereas the Párs community has represented the necessity of defining an amending the law relating to marriage and divorce amon Párs is; and whereas it is expedient that such law should b made conformable to the customs of the said community." And Sec. IV. enacts that "no Pársi shall after the com mencement of this Act contract any marriage in the lifetim of his or her wife or husband, except after his or her lawfu divorce from such wife or husband, by sentence of a cour as hereinafter provided; and every marriage contracted con trary to the provisions of this section shall be void."

This shows what the state of the law with regard to mar riages was among the Párs is, that the customs of the sec were such that such second marriages could not be se aside; and the opinion is strengthened by the case cited fron Borrodaile by the learned Judge. It may be that that cas was decided on customs and usages prevalent in the Mofus sil; but it throws light upon the usages of the Párs is i Bombay.

Before Act XV. of 1865 came into operation, a Pársi con tracting a second marriage in the lifetime of his or her wif or husband could not be punished under the Indian Pena Code. Sec. XXX. provides that "any husband may su that his marriage may be dissolved, and a divorce granted on the ground that his wife has since the celebration there of been guilty of adultery; and any wife may sue that he marriage may be dissolved, and a divorce granted, on th

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ground that since the celebration thereof her husband has been guilty of adultery with a married, or fornication with an unmarried, woman, not being a prostitute, or of bigamy coupled with adultery, or of adultery coupled with cruelty, or of adultery coupled with wilful desertion for two years or upwards, or of rape, &c. But bigamy coupled with adultery must have reference to a marriage which was unlawful, and therefore bigamous. I do not see any reason why marriages contracted before the passing of the Act should be made subject to the consequences of the Act. When it was passed, nothing could have been further from the intention of the Legislature than to give a retrospective effect to it. Hence questions with reference to past marriages cannot be raised under this Act. They must be governed by the law which prevailed before it came into operation.

TUCKER and WARDEN, JJ., concurred.

Order affirmed.

Regular Appeal No. 19 *of* 1863.

ARDESHIR DHANJIBHA'I.....*Appellant.*
THE COLLECTOR OF SU'RAT .....*Respondent.*

Suit relating to land—sanad—destruction of document by party.

In a suit brought against a Collector to compel him to refrain from preventing the plaintiff executing his decree against certain land—the only issue being, whether the land was the private property of the judgment debtors, or Government service land—the plaintiff alleged that the land had been granted in free *inám* by a *sanad*, which he petitioned the Mámlatdár of the parganá to search for, and send to the Collector; and, on a reference by the High Court, the District Judge found that "the Collector did destroy the document that purported to be a copy of a *sanad* such as the plaintiff petitioned the Mámlatdár to search for":—

Held that it was not competent for the defendant to say that the document was not such a one as could be legally admitted in evidence; and that the case came within the rule *omnia præsumuntur contra spoliatorem.*

1866. August 1. R. A. No. 19 of 1863.

THIS was a regular appeal from the decision, in Original Suit No. 3 of 1863, of R. H. Pinhey, Acting Judge of the Súrat District, whose judgment was as follows:—

1866. August 1. R. A. No. 19 of 1863.

"The plaint sets forth that Girdhar Govan and his son Hargovan Girdhar mortgaged to plaintiff Ardeshir and his brother, in A.D. 1832, eight and a half bighás of land at Singápúr, in the Chaurásí Parganá of the Súrat District; that a suit, No. 874 of 1860, being brought on the mortgage bond, a decree was given in plaintiff's favour by A'zam Daulatrái Sampatrái, Munsif of Súrat; that plaintiff sought to execute this decree against the land mortgaged by Girdhar Govan and Hargovan Girdhar, but was prevented from doing so by the Collector of Súrat, on whose representation that the land was service land, the Munsif, on the 21st of May 1862, raised the attachment placed on it by plaintiff; that the land is not service land, but *inám* land, against which plaintiff's decree may be executed; and that, therefore, this action is brought against the Collector to compel him to refrain from preventing plaintiff executing his said decree against the said land.

"This case was set down for settlement of issues on the 1st of July; but was postponed to this day, in consequence of the Government Pleader being absent on leave. The defendant, the Collector of Súrat, declines to tender any written statement under Sec. 120 of the Code of Civil Procedure.

"The Government Pleader being examined, under Secs. 125 and 139 of the Code of Civil Procedure, states that neither Girdhar Govan nor his son Hargovan had any land in the village of Singápúr; that the whole eight bighás of land against which plaintiff seeks to execute his decree are Government land, and are assigned, for services performed, to the pátel of the village for the time being; that, therefore, this action is barred by Sec. 13 of Act XI. of 1843; that when Girdhar Govan was pátel, he held the land until he became blind, when the land passed with the pátelship to his son Hargovan; that Hargovan held the land as pátel up to the time of his death, last year; that Hargovan was succeeded in the pátelship by Bhávanishankar, who now holds the office, and with the office enjoys the proceeds of the land which plaintiff desires to sell in execution of his decree; and that,

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although the land is called *inám*, it is in fact *service inám*, and is so entered in the village accounts.

"The only question at issue in this case is:—Is the land, against which plaintiff seeks to enforce his decree, the private property of his judgment debtors, Girdhar Govan and Hargovan Girdhar? or is it Government service land, assigned by the Collector for the fit maintenance of the officiating pátel of the village of Singápúr?

"I think it unnecessary to call on the defendant to produce any witnesses or to file any proofs on his own behalf; as I consider that the plaintiff has altogether failed to make out his claim, and that judgment must be given for the defendant on the issue laid down.

"It is admitted on both sides that the land mentioned in the plaint is *inám*. It is notorious that, besides many other divisions and subdivisions and descriptions, all ináms, in the Bombay presidency at least, may be divided into two classes, viz., *service ináms*, and ináms to the enjoyment of which no service is attached. If this point, instead of being notorious, were a matter of doubt, it is sufficiently established by plaintiff's own witnesses in this case. On the motion of plaintiff, the defendant has filed forty books and accounts. In every one of these, in which the land in dispute is entered in any other head than the simple one of inám, it is described as service inám, and in the very oldest of the forty it is entered as inám, in the occupation of the then pátel, Girdhar Govan. It is proved by the same forty books and accounts, and by the Majmudár, plaintiff's witness No. 21, that the land has been held successively by four pátels up to the present time. There is not an atom of proof that the land was the private property of the plaintiff's judgment debtors, the former pátels, Girdhar Govan and Hargovan Girdhar.

"A technical objection might be taken *in limine* to plaintiff's claim: inasmuch as he has not filed either the original deed or a copy of it, under which the land was first assigned to him by the former occupants, Girdhar Govan and Har-

govan Girdhar. But leaving this objection on one side, there is an objection to the claim which it is impossible to leave unconsidered. Plaintiff asserts that the mortgagors held this land under a sanad; but this sanad is not produced. It does not appear ever to have been given over to plaintiff when he took the land in mortgage. The very existence of this sanad is not proved. If it ever existed, it is not proved to have ceased to exist, or to be at this date not produceable: all that plaintiff has done is to challenge the defendant, the Collector, to produce a copy of the original sanad from his records. The Collector in the first place denies the existence of such a sanad as plaintiff refers to; secondly, he denies his liability to produce a copy of such a sanad so long as plaintiff fails to prove that the original is not forthcoming; thirdly, he denies that he ever had a duly authenticated copy of any sanad regarding the inám lands of Singápúr; fourthly, he contends that the only copy of any such sanad that he ever had was an unauthenticated copy, which has been destroyed as useless.

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"Considering all these circumstances and facts, and the provisions of Sec. 13 of Act XI. of 1843, I consider that plaintiff's claim fails.

"It is scarcely necessary to notice the arguments based on the deposition of the witnesses Pestanji Fakirji and Dádábhái Naoroji, as they are so easily disposed of. Pestanji Fakirji was called to show that he had bought three-fourths of a bighá of inám land at Singápúr, but it does not appear whether this land was service land or not; and even if it were service land, it is shown by the title-deeds which he produces that the transfer of the land was made out of court, and without the Collector having either to sanction or to refuse sanction to the arrangement. In fact it is not shown that the Collector is aware of the transfer. The other witness, Dádábhái Naoroji, was called to prove that he had twenty-three bighás of inám land at the village of Umrá, for which he does no service. If this be the case, the only inference to be based thereon is, that the inám so enjoyed is not service inám. I throw out the claim with costs."

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The appeal first came on for hearing on the 7th of September 1864, before Sir JOSEPH ARNOULD, Acting C.J., TUCKER and WARDEN, JJ.

Anstey (with him *Shántárám Nárâyaṇ* and *Dálábhái Frámji*) called the Court's attention to the destruction of the sanad, which the appellant relied upon, and had applied to the Mámlatdár to forward to the Collector. The doctrine *omnia præsumuntur contra spoliatorem* applied: The *Le Louis* (*a*). The exhibits upon which the Judge had found for the Collector were commented upon as being incomplete and untrustworthy.

Dhirajlál Mathurádás for the respondent:—The exhibits which had been filed at the instance of the plaintiff himself showed clearly that his judgment debtor had no right to the land except by virtue of his páṭelship,—in other words, that it was a service inám. [ARNOULD, C.J.—We should like to hear you first on the subject of the non-production of the documents.] The notice to produce requires the production, among other things, of a petition to the Mámlatdár, his report thereon, and the copy of the sanad which accompanied it; but the Collector had the right of refusing to produce official correspondence. It was merely a copy, and, as such, secondary evidence; and, consequently the plaintiff could not compel its production, without first accounting for the original, which he did not do. Besides, it was not destroyed after receipt of the notice to produce: it had been previously destroyed; the Collector had a right to destroy it, if he considered it useless; and he was not bound to preserve evidence, in anticipation of being called upon to produce it by his adversary. There was no notice to produce.

ARNOULD, C.J.:—This is a peculiar case. A suit is commenced; the Collector has notice of it; a document is required by the plaintiff; he applies to the Mámlatdár to make a search for it; a search is made; the document is found; it is sent to the Collector, and he destroys it. If this is not spoliation, I do not know what is.

(*a*) 2 Dods. 245.

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PER CURIAM :—The Court returns the proceedings to the District Judge, and directs him, first, to compare the extracts filed by plaintiff (Nos. 26 to 66) with the Collector's books and accounts, and to certify if they be correct, and if not, or where not, to supply correct copies; secondly, to examine the gentleman who was officiating as Collector of Súrat at the time of the alleged destruction of the copy of the sanad, as to the exact circumstances and time under and at which such alleged destruction took place, in order to ascertain whether he destroyed, or caused to be destroyed, a document which purported to be the copy of such a sanad as Ardeshir Dhanjibhái petitioned the Mámlatdár to search for.

The following finding was returned by C. H. Cameron, Judge of the Súrat District :—

"I have examined and compared exhibits Nos. 25 to 66 with the originals. I found one or two clerical errors, and in one paper where an erasure had been made in the original, and a correction written above it in the copy, no notice was taken of the erasure: the correction was entered at once; the copy has been prepared not showing erasure and correction.

"As Mr. Ravenscroft, the Collector of Súra tat the time of the alleged destruction of the copy of the sanad, was officiating as Secretary to Government in Bombay, and as he intimated that his services could hardly be spared from Bombay, and as Ardeshir Dhanjibhái's vakíl, Dáyabhái Saváichand, had no objection to the arrangement, I issued a commission to the Small Cause Court, Bombay, before one of the Judges of which (Mr. Spencer) Mr. Ravenscroft's deposition was taken, and it is now forwarded.*

* NOTE.—The following are extracts from the evidence of Mr. Ravenscroft :—"I know that a petition was addressed by the plaintiff in this suit to the Mámlatdár of the Chaurási Pargana, requesting that the register of sanads might be examined. The petition was sent to my office by the Mámlatdár. A Persian document was sent with the petition. * * * I sent the Persian document to the Judge's Court, and got a translation made. After the document was returned with the translation, I destroyed it, as I considered it to be a useless document. To the best of my recollection it was not in the usual form of a sanad. It purported to be a grant of land. My general impression is that it purported to be such a document

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"It seems right that I should point out that Mr. Ravenscroft was mistaken in supposing that when documents are sent to the Judge, or Agent for the Honourable the Governor at Súrat, for translation, a copy is kept. This arrangement has always been a demi-official one, of which no record was kept. Persian documents are even sent sometimes with an English note, and sometimes a Gujaráti note. The translation was made, and the papers returned at once with a like note, no record whatever being made.

"On the first issue, I return the corrected exhibits Nos. 26 to 66.

"On the second issue, my finding is that Mr. Ravenscroft did destroy the document that purported to be a copy (whether it was a copy available as proof in a court, or not, does not appear) of a sanad such as Ardeshir Dhanjibhái petitioned the Mámlatdár to search for."

The case came on for further hearing this day, before the same Judges.

Reid and *Shántárám Náráyaṇ* for the appellant.

Dhirajlál Mathurádás, for the respondent, asked to have the case remanded for further evidence, which would show that the land was *service inám*.

ARNOULD, J.:—As to the point whether the defendant should now be allowed to give additional evidence, I think

as was described by the plaintiff at the trial of the suit. I do not remember the contents of the document. * * * I was served with a notice to produce the Persian document. I had destroyed it before the notice was issued. When I destroyed the document I knew that the suit was pending. * * * I considered the document to be useless, as it was not numbered or registered in the office, nor did it bear any mark of having been received in the Mámlatdár's office; and because I knew that, if it was genuine, the plaintiff could have procured a copy from the proper source. In accordance with [certain] Regulations, the sanads of all the landholder have been, and are, registered at Súrat, copies of them being made in a book. Another reason for destroying the document was that, as it had been sent to the Judge's office for translation, the plaintiff could have obtained as copy of the translation, and of the document itself, from that office; as I presumed a copy of it was retained there. * * * At this distance of time I cannot say, from my recollection of the translation, whether the Persian document purported to be an original, or a copy, or the copy of a copy; but in the notice served on me by the plaintiff it was described as a copy. It is the practice in the offices at Súrat to destroy all useless documents."—ED.

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that the application should have been made when the case first came on for hearing before this court; and that it is now too late to make such an application, after the case has been already remanded, and has come back for final disposal.

With reference to the destruction of the document, it has been found by the District Judge that Mr. Ravenscroft did destroy what purported to be a copy of a sanad such as Ardeshir Dhanjibhái petitioned the Mámlatdár to search for. The case, therefore, comes within the rule *omnia præsumuntur contra spoliatorem;* and it is not now competent for the defendant to say that the document was not such a one as could be legally admitted in evidence.

The Acting Judge was wrong in holding that the plaintiff had not made out a *primâ facie* case; and his decree must be reversed.

TUCKER and WARDEN, JJ., concurred.

PER CURIAM:—The Court reverses the decree of the Acting District Judge; and declares that the land described in the plaint is free, and not service, inám, and that the appellant Ardeshir Dhanjibhái, is entitled to execute the decree, which he holds against Hargovan Girdhar and others, by the sale of the said land.

The Court orders the respondent to bear all costs, including the costs of the commission from the District Court to the Bombay Court of Small Causes.

Appeal allowed.

NOTE.—"As to the third point decided in this case (*Armory Delamirie*, Stra. 504), it is an illustration of that favourite maxim of the law *omnia presumuntur contra spoliatorem*, which signifies that if a man, by his own tortious act, withhold the evidence by which the nature of his casewould be manifested, every presumption to his disadvantage will be adopted: *Crisp* v. *Anderson* 1 Stark. N. P. C. 35; [*Attorney General* v *Dean and Canons of Windsor*, 24 Beav. 679]; *Clunnes* v. *Pezzey*, 1 Camp. 8, *et notas.*" [followed, *Lawton* v. *Sweeney* Ex.), 8 Jur. 964.]—1 Smith L. C., 5th ed., 308.

"If," says Lord *Holt*," a man destroys a thing that is designed to be evidence against himself, a small matter will supply it." Anon. 1 Ld. Raym. 731. This rule is evidently based on the principle that no one shall be allowed to take advantage of his own wrong."—Best, Ev. § 399 *et seq. Nullus commodum capere potest de injuriâ suâ propriâ:* Co. Litt. 148 *b*; Broom, Leg. Max., 3rd ed. 255. *Nemo ex suo delicto meliorem suam conditionem facere potest:* Dig. 50, 17, 134, § 1.—ED.

Special Appeal No. 729 *of* 1865.

ANNA'JI' A'PPA'JI'.....*Appellant.*

KA'SI' A'TMA'JI' and others.....*Respondents.*

Inámdár—perpetual lease—ejectment.

Where a family of kulkarnís in the Konkan was proved to have been in actual occupation of land under an inámdár, for ninety years, at a uniform rent:—

***Held,* in the absence of proof of any lease for a more limited term, as alleged by the plaintiff, that the occupants were entitled to hold as lnog as they paid the usual rent.**

1866. July 19. S. A. No. 729 of 1865.

THIS was a special appeal from the decision of W. H. Newnham, Acting Senior Assistant Judge of the Konkaṇ, at Ratnágirí, in Appeal Suit No. 258 of 1865, reversing the decree of the Munsif of Málvaṇ, in Original Suit No. 449 of 1864.

Aṇṇájí sued Kásí and others for possession of a field: alleging that it was his inám, and had been let to A'tmáji, the father of the first defendant; but that the defendants would not restore it to him.

Kásí answered that the land belonged to himself and certain of the other defendants, and was not the plaintiff's; that he paid rent to the plaintiff as the inámdár in whose name the land stood, but that he had the right of occupancy; and, further, that the third share of the land had been given to him rent-free in 1843 by the plaintiff's brother.

The other defendants, who were either holders in the same interest with Kásí, or mortgagees under them, answered, asserting their respective rights.

The Munsif found that the plaintiff was the owner of the land; that the defendants did not prove a right of perpetual occupancy, as they were merely the tenants of the plaintiff, or of others deriving their rights from him; and that the alleged gift of one-third of the inám by the plaintiff's brother was not valid, even if proved, without the consent of the plaintiff. His decree was, therefore, for the plaintiff.

1866. July 19. S. A. No. 729 of 1865.

Against this decree the defendants appealed, urging (amongst other grounds) that the kulkarṇí defendants' right of perpetual occupancy had been proved, whilst the sanads of the plaintiff only gave the revenue of the land to him; and that the conveyance (No. 14) of one-third of the inám had been proved, and was valid.

The Senior Assistant Judge laid down the point for decision to be: Has Aṇṇáji a right to eject the defendants, or have they a right of perpetual occupancy; and recorded the following judgment:—

"Defendants allege that only the revenue of the land was granted to plaintiff's family, and not the right of occupation. This I do not find. The old sanad (or rather order) produced by him, which is dated as far back as A.D. 1718, distinctly specifies that the land was granted as mirási, or inheritance. But it is admitted that neither the plaintiff nor his ancestors ever had possession personally; and although the kulkarṇí defendants do not prove, as they allege, that they have been the occupants ever since the grant to plaintiff's ancestors, it is admitted by him that they have had occupancy for more than one generation. Their occupancy is recognised in two orders given to the Mámlatdár, in the time of the Peshwá; and in the papers produced by them, the rights of plaintiff's family as inámdárs, and of defendants as occupants, are coupled.

"The plaintiff does not produce any document showing the alleged lease to A'tmáji (it was lost, he says, when his house was burnt); nor is there oral evidence of such a lease. The only approach to a recognition of his power over the land which he shows, is a mortgage of A.D. 1809, by the grandfather of one of the defendants to one Gadre of some of the land, in which it is specified: 'when the owner comes he will redeem the land;' but this is not enough by itself.

"Though the position of the kulkarṇís has been that of tenants under the inámdár, there is, I think, reason to believe that their rights as occupants are contemporary with his inám rights (just as in many cases those of the khot and

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dhárekharís); and I do not consider the plaintiff has the right to eject them.

"The Munsif's decree is reversed; and the claim thrown out with costs on Aṇṇáji."

Against this decision a special appeal was admitted upon the following grounds:—(1) The Senior Assistant Judge was in error in holding that the appellant had admitted that neither he nor his ancestors ever had possession of the land personally, there being no such admission on the record, nor was any such ever made by him; (2) that he was in error in not throwing the *onus* of proving the right of perpetual occupancy, in limitation of the rights of the inámdár, upon the respondents; (3) that he misconstrued the documents Nos. 46 and 47, in holding that respondents' right of occupancy was recognised by the Peshwá; (4) that he was wrong in holding that in the papers produced by the respondents their right as occupants, and that of the appellant's family as inámdárs, were coupled: as those papers, having been prepared by the respondents themselves as kulkarṇís, were inadmissible as evidence against the appellant; (5) that he was wrong in not considering the admission contained in the mortgage deed as conclusive against the obligor, and that Kási's father, having attested the same, must be considered to have acquiesced in the arrangement.

Dhirajlál Mathurádás, for the appellant, urged the grounds of appeal generally, and contended that the position of the inámdár was clearly that of landlord; that the tenancy was only a yearly tenancy; that, except the length of their possession, the defendants had given no evidence of their allegation of being perpetual occupants; that the ordinary law of landlord and tenant should be enforced, and the claim to eject allowed.

Shántárám Náráyaṇ, contra, urged that the plaintiff had failed in making out the case he put forward in his plaint, viz., a lease of the land to Á'tmáji, the father of defendant Kási; that defendants had been found to have an estate in the land not defeasible at the will of the plaintiff,—in other

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words, an estate in fee; that in this country, unless the tenant were protected by long occupancy, as in this case, the proved actual occupancy for ninety years, under exhibits Nos. 46 and 47, not to speak of the Judge's opinion that both the inám and the tenancy were coeval, *i.e.*, 146 years old, when the suit was brought, there would be no such thing as a perpetual estate in the land; and that from the ináṃdárs' acquiescence in the long and uninterrupted occupancy of the kulkarṇís at a uniform rent, the Judge was justified in presuming an arrangement of perpetual occupancy between them : *Sule* v. *Dhundiráj Vináyak (a)*.

Per Curiam (Tucker and Gibbs, JJ.) :—In this case it has been shown that the tenants have been in actual occupation of the fields in dispute for ninety years; and that during that term they have paid a fixed proportion of the grain produced to the ináṃdár.

From this long and uninterrupted occupation at a uniform rent, it may be inferred that the land was demised on a perpetual lease; and we hold that, in the absence of proof of any lease for a more limited term, as alleged by plaintiff in the plaint, the defendants cannot be ejected so long as they pay the usual rent.

We do not find that the Senior Assistant Judge has committed any error in law in coming to the conclusion at which he arrived on the evidence; and we, therefore, affirm his decree.

Decree affirmed.

(*a*) *Antè*, p. 55.

Special Appeal No. 97 *of* 1864.

BHIMA'PPA'.....*Appellant.*
MARIA'PPA'.....*Respondent.*

Service land—coparceners—bequest—Reg. XVI. of 1827, *Sec.* xx.—*Act XI. of* 1843.

Held that the interest enjoyed by one of a body of coparceners, in possession of land attached by way of emolument to an hereditary office, cannot be bequeathed to one or more of the other coparceners: as the estate held by each sharer is only a life interest, subject to the right of the Collector, under Act XI. of 1843, to assign a fit remuneration from the rent and profits for the maintenance of the person appointed to conduct the duties of the office.

1866. July 26. S. A. No. 97 of 1864.

THIS was a special appeal from the decision of A. L. Spens, Assistant Judge of the Dhárwár District, in Appeal Suit No. 298 of 1862, reversing the decree of the Principal Ṣadr Amín of Dhárwár.

The appellant and two others, sons of Malláppá, sued their uncle, the defendant, Mariáppá bin Tammáppá, for a half share of certain lands attached to the shetsandí watan of Náválar, claiming one-third as the sons of one of three brothers, viz., Malláppá, Ningáppá, and Mariáppá, the sons of Tammáppa; and the remainder upon a document passed to them by Ningáppá, deceased, on the 16th of August 1858.

The defendant answered that the deed was a forgery; but the Principal Ṣadr Amín, holding the claim proved, decreed in favour of the plaintiffs.

The Assistant Judge, in appeal, laid down the points for decision as follow:—(1) Had Ningáppá, deceased, any authority to pass document No. 1 without Mari Tammáppá's consent; (2) The portion of the land mentioned in the plaint being Government service land, could Ningáppá alienate this land, his own rights in the land ending with his life: (3) Is the watanpatra proved.

On these issues he found: (1) That immoveable property vested in a united family could not be alienated without the consent of the heirs; (2) That Ningáppá had no right to

alienate any portion of a service watan. No decision on the third point was, therefore, necessary; and the decree of the Principal Ṣadr Amín was reversed.

1866. July 26. S. A. No. 97 of 1864.

The special appeal first came on for hearing on the 22nd of July 1864, before TUCKER and JANA'RDAN VA'SUDEVJI, JJ., when the following issues were framed, and sent down to the lower court for trial:—(1) Was Ningáppá, at the time he executed the deed (No. 1), filed with the plaint, united in interest with his brother the defendant, and his nephews the plaintiffs; (2) Was the land which forms the subject of the present dispute hereditary service land, and had the said land been apportioned between the several sharers at the time when Ningáppá executed the abovementioned deed; (3) What is the value of a sixth share of the land, which the plaintiff claims, in excess of the portion to which he would have been entitled under the ordinary rules of descent.

The following finding was returned by J. R. Daniel, Assistant Judge:—

On the first issue, I find that at the time Ningáppá executed the deed, he was united in interest with his brother Mari Tammáppá, the defendant, and also with his nephews the plaintiffs. * * *

"On the second issue, I find that the land which formed the subject of dispute was hereditary service land; but that at the time when Ningáppá executed the deed, the land had not been apportioned among the several sharers. * * *

"On the third issue, I find that the value of a sixth-share of the land which the plaintiffs claim in excess is Rs. $4\frac{1}{4} \times 18 = \text{Rs. } 76\frac{1}{2}$.

The appeal came on for further hearing this day.

Dhirajlál Mathurádás and *Vishvanáth N. Mandlik* for the appellant.

Vishnu Moreshvar Kelkar for the respondent.

PER CURIAM (TUCKER and GIBBS, JJ.):—The plaintiffs in this suit claim two-thirds of a moiety of the lands, appurtenant to the shetsandí watan of Návalár, on the grounds

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that one-third of the said moiety had descended to them by inheritance, and that another third had been bequeathed to them by their uncle Ningáppá.

It has been found by the lower appellate court that the lands claimed are attached to an hereditary office; and that at the time the alleged bequest was made, the moiety in which the plaintiffs claim to share had vested in a united Hindú family, the members of which were the plaintiffs, the defendant, and the deceased Ningáppá.

The alleged bequest is to be found in a covenant entered in a deed of settlement (exhibit No. 1) executed by the deceased Ningáppá, who appears during his lifetime to have been the manager of the joint estate, and to which deed the defendant was no party.

We are of opinion that the lands attached to hereditary offices are entailed estates, the holders of which are simply tenants for life, who cannot alienate or encumber such estates beyond the term of their natural lives. This has been distinctly declared to be the law when such estates have vested in a single person, by the interpretations published by the late Court of Ṣadr Diváni Adálat, on Reg. XVI. of 1827, Sec. xx., under date the 3rd of February 1831, and the 5th of December 1834 (*a*), which declaration of the law has governed all subsequent decisions on the subject.

It is now contended that, though the sole incumbent of a hereditary office cannot alienate or encumber the lands which attach to it beyond the period of his life, yet that when the estate has vested in a body of coparceners, one of the parceners may bequeath his interest to another parcener, though he could not alienate it to a stranger.

This argument is founded on the words of Reg. XVI. of 1827, Sec. xx., cl. 2: "Official emoluments enjoyed by a co-sharer of any district or village office shall not leave the family in which the office is vested; and if they revert to a sole proprietor or occupant of the office, they shall thenceforth follow the provisions of the preceding clause," by which

(*a*) Harrison's Code, Vol. II., p. 757-758.

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they "shall be considered strictly as the official remuneration of the person filling the office, and as such shall not be subject to alienation by any incumbent."

We consider, however, that the estate which each parcener holds in his particular share cannot be larger than the estate possessed by the whole body of coparceners in the entire property; and that this last estate being a life-estate only, the estate of each parcener in his particular share is similarly limited: consequently, there is no power of bequest; inasmuch as there is nothing to bequeath, either in the one case or the other.

Setting aside, then, the supposed bequest, it would seem that on the decease of Ningáppá, the plaintiffs and the defendant became each entitled to a half-share in the joint estate which had descended to their branch of the family, which amounts to a moiety of the entire watan, and which has passed into the possession of defendant, subject to the right of the Collector to assign the whole or any portion of this estate as a provision for the fit maintenance of the person appointed, under Act XI. of 1843, to perform the duties of the office.

It has not been asserted that any provision for the officiating incumbent has been made; but, subject to such provision, plaintiffs will be entitled to share with the defendant, the enjoyment of the land, and to recover from him the half of any lands appurtenant to this watan which may have passed into his possession, and which have not been included in the provision for the officiating incumbent. The decree of the Assistant Judge will therefore be modified, by declaring the plaintiffs entitled to this extent.

Decree amended.

Special Appeal No. 669 *of* 1863.

ṬA'JUBA'I kom DA'U'DKHA'N JANGALKHA'N...*Appellant.*
The SUB-COLLECTOR OF KULA'BA'.....*Respondent.*

Khotí tenure—Shilotrí hak—mortgage—Revenue Survey—resumption —Reg. XVII. of 1827.

In a suit brought by a khot, in 1862, to recover an hereditary share in a khotí village, which had been mortgaged by her husband in 1845, and taken directly under Government management by the Sub-Collector of Kulábá, on failure by the mortgagee to pass the customary agreement (*kabuláyat*) for the security of the revenue for the year 1851-52, the court of first instance decreed the restoration of the khotí estate, on payment by the plaintiff of any loss which may have been sustained by Government during its interim management; but the District Judge, in appeal, modified that decree by annexing a condition, that the plaintiff was to observe the engagements which had been entered into between Government and the sub-tenants of the estate, through the Revenue Survey—which had been introduced during the direct management of the village by Government—whether as regards the rates of assessment, or the rights of tenancy :—

Held by *Arnould* and *Newton, JJ.*, (*Tucker, J., dissentiente*), that the plaintiff had no right to object to the conditions, subject to which the District Judge had allowed her claim to resume the khotship.

1866. August 1. S. A. No. 669 of 1863.

THIS was a special appeal from the decision of C. Gonne, Joint Judge of the Konkaṇ District, in Appeal Suit No. 668 of 1862, modifying the decree of H. Birdwood, Assistant Judge of the Konkaṇ at Tháná, in Original Suit No. 1 of 1862.

The following judgment, in which the facts are fully stated, was recorded by the District Judge :—

"The plaintiff in the original suit, a khot, sued the Sub-Collector of Kulábá to compel the restoration by him of the management of her half of a khotí village, and of one and a half khárs, of which the management had, for the ten previous years, been assumed by the Sub-Collector on behalf of Government. This had not happened in consequence of the immediate fault of the real khot, but of the fault of one Gangárám Márvádí, to whom the khotí rights had been mortgaged, and who had failed in 1851-52 to pass the customary annual kabuláyat to the Sub-Collector. In 1860-61 the plaintiff had redeemed the mortgage, and had applied for the

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restoration of her khotí and shilotrí rights, offering at the same time to make good any loss the Government might have been put to, during their direct management; but the application had been refused.

"The Sub-Collector, in answer, denied the right of the khot to reënter on the management of the village and the khár. The khot's right, he contended, rested on the annual kabuláyat passed to the Collector; and a failure to pass that kabuláyat worked a forfeiture of the right. Besides, during the ten years of direct management by Government the Revenue Survey had been introduced.

"The Assistant Judge found that the right of a khot, equally with the right of a shilotridár, was proprietary in its nature; and that the failure of the khot to pass the yearly kabuláyat could not be construed into an abandonment of this proprietary right, because it was the universal custom of Government to restore the management of the village to the khot, on his application, and, therefore, in giving up his village into the hands of Government, the khot must have done so under the impression that it would be any day recoverable. And besides the custom of restoring the management of the village to the khot as a matter of course had gone on for so long—ever since the accession of the British government—that the right of refusal, if it ever existed, must, in the absence of proof to the contrary, be held to have been lost. The law applicable to the rights of khots was, the Assistant Judge held, Reg. XVII. of 1827, Sec. VIII., which expressly aimed at the perpetuation of the tenure; and though the second clause of this section provided for the reversion of the village to Government, to ensure, in certain cases, the realisation of the revenue; yet this reversion must be held to be only temporary, by the application of the principle embodied in Sec. XI., cl. 5, of the same Regulation.

"The Assistant Judge, therefore, decreed that plaintiff should, on making good the loss incurred by Government during their time of management, be allowed to reassume herself both the management of the khotí village, and the one and a half shilotrí khárs.

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"Against this decision the Collector has appealed, on various grounds; but the main point for decision is that raised by the Assistant Judge, namely, whether the respondent has, as khot, a right to reënter on the management of the village and khárs, which management was assumed by the Government on the failure of the khot's mortgagee to pass the annual kabuláyat.

"The Court allows the appellant to put in the evidence of Mr. Scott, late Collector in the Konkaṇ Zillah, and also of certain extracts from the Peshwá's daftar; considering that the question at issue is of importance to a large class of interests, besides those of the parties in the case, and that additional light for its settlement should not be excluded even at this stage of the proceedings.

"The consideration of the khot's claim to a restoration of his khotí rights over the half-village ought, the Court thinks, to be kept distinct from that of his claim to a restoration of his shilotrí rights over the khárs.

"It is necessary first to settle what is the nature of the khot's right. Is it proprietary? that is, is the right inherent in the khot to a certain portion of the produce of the khotí village, to be obtained through his management of the village? or is it a right perpetually derived from the State, to farm the revenues of the village and enjoy the possible profits. The settlement of this question is necessary, because the vitality of these two descriptions of right would, the Court thinks, depend on different principles.

"First, then, what is the meaning of the word 'khot'? It is stated in Molesworth's Dictionary to be 'a renter of a village, a farmer of land or revenue, a farmer of the customs, a contractor or monopolist; an hereditary officer whose duty it is to collect the revenue of the village for Government, also an officer appointed for this office; a tribe of Brahmins in the Southern Konkaṇ.' The last meaning, no doubt, refers to the khots now in question, but the previous meanings show the etymology of their designation.

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"In the second place, what was the footing of the khots in relation to the Peshwá's government? To answer this question fourteen extracts from the Peshwá's daftar have been put in evidence, and they show mostly instances of the khot's removal from his khotship at the arbitrary will of the Peshwá's government; and sometimes for such reasons as failure of the khot to satisfy the increased demands of the government, oppression of the ryots by the khot, disagreements between two shareholders of the khotship causing disgust to the ryots.

"In the third place, What are the features of the khotí tenure as continued under the British government, and as it has grown up to the present day? On this point the Court has the benefit of the evidence of Mr. Scott, who has enjoyed the unusual experience of ten years in the Revenue Department, passed in the collectorates of Tháná and Ratnágirí.

"The khot, it appears, engages each year by kabuláyat to pay the Government a consideration for the management of the village, fixed in kind. The option is given him of paying in money, according to the commutation rates laid down for each year by the Collector, and so far ás there may be variations in the market value of grain, there may be variations in the yearly consideration paid by the khot to Government. But there is no variation in the grain estimate of that payment, and the same would be exacted in times of an abundant harvest and in times of famine. The khot, on the other hand, collects for his own benefit as much as he can from the cultivators; his demands being ostensibly limited by custom to one-half of the actual produce of field of good quality, and one-third of fields of inferior quality. The realisations of the khot, therefore, must depend on the amount of land under cultivation, and the goodness or badness of the season. His management of the village is a speculation. If the total of his collections rises above the Government claim, he gains; if it falls below, he loses; and how speculative is the nature of the khot's interest, appears in the frequent instances which have occurred of the khot's

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temporary withdrawal from the management of his village. It cannot be supposed that he would do so if his profits were certain; and it is probable that the prospects of a bad season, or disagreement with the cultivators, or some other cause affecting the chance of large collections, has on these occasions induced the khot to spare himself both risk and trouble, and wait for better times. The natural way of effecting this withdrawal is the khot's refusal to sign his yearly kabuláyat. On this refusal the Collector assumes the direct management of the village on behalf of Government, and collects, or rather has a right to collect, the same as the khot would have had. At the end of the village accounts a memorandum is entered, comparing the total of actual receipts with the fixed payment in gross which the khot has ceased to make, and showing in fact whether the direct management has caused to Government a gain or a loss. When after a time the khot applies for a restoration of his position, it has been the invariable custom for the Collector—whether as a matter of indulgence or a matter of legal necessity, being the point at issue—to accede to the application. But a reference is first made to the accounts, and if they show that the direct management has caused to Government a loss, the khot must make good the same before he can recover his rights; while if it has caused a gain, the same is credited to Government, and is not, as a rule, made over to the khot.

"It is necessary here to state that the consideration which gives a value to the khot's rights, is not only the chance of his collecting more from the ryots than he has to pay to Government, but his power of occupying on his own account land out of cultivation, land thrown up by ryots, and land from which ryots can be legally ousted; and it appears to be generally the fact that a khot does occupy a portion of the land in his own khotship. As the extension of the khot's private holding makes no difference in the fixed sum which he has to pay to Government, the khot in point of fact holds the same rent-free, that is, as long as his khotship endures; but when the khot withdraws, and the Collector takes his

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place, he loses the peculiar advantage of his holding. He sinks, as regards his holding, into the position of a ryot, and becomes liable to pay, like any other ryot, one-half or one-third of the produce of his holding, as dictated by the custom of the country.

"Now the object of the Court in describing the idea it has gained from the evidence of a khot's tenure, has been to lay down the *data* for judging whether the nature of the khot's interest is proprietary or otherwise.

"It has been argued on the one hand that the proprietary nature of the khot's right has been signified: (1) by its admitted susceptibility of sale or mortgage; (2) by the usage which has permitted its exercise or non-exercise according to the pleasure of the khot; (3) by the khot's power to assume for himself the occupancy of neglected and vacated land.

"On the other hand it has been argued that the non-proprietary nature of the khot's interest has been signified: (1) by his liability to pay rent, and as much rent as any other tenants, for lands held by himself during any cessation of his khotship; (2) by his liability to make good any loss incurred by Government during such cessation, coupled with absence of right to any gain; (3) by usage of Government taking from the khot a renewed kabuláyat year by year.

"It appears to the Court that the first argument, founded on the right being alienable, may tend to prove that it is hereditary, but does not affect the question of its nature.

"The second argument, of the exercise of the right being by usage optional, begs the question at issue. No doubt the option has been exercised; but whether as a consequence of the khot's right or the Government's permission, is the point now to be settled.

"The privilege of the khot to enjoy the first refusal of all vacant and available land in his khotship is a natural incident of his position; but his liability to pay as much rent as any other tenant for his holding, during any suspension of his khotship, renders that privilege no support to a proprietary claim."

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"The khot's liability to make good loss to Government, if there has been loss, during such suspension, without claiming the profit, if there has been profit, shows that his option to resume his khotship, if he possesses it, is fettered with a condition significant of his want of proprietary title.

"On the other hand, the Court does not look on the practice of the khot having to pass a yearly kabuláyat as a disparagement of his proprietary claim. The necessity of his giving renewed security supplies a sufficient reason for the practice. The kabuláyat, moreover, marks the privilege of the khot to settle directly with Government; and the technical form assumed by his demand for reinstatement, is the assertion of his right to pass these kabuláyats.

"On the whole, however, looking at the meaning of the term 'khot,' at the khot's footing with the Peshwa's government, and comprehensively at the features of the tenure as continued till the present day, the Court arrives at the conclusion that the khot has no proprietary right in the soil in his village, but an hereditary right to farm the revenues.

"But the Assistant Judge has held that the khot's right in the soil has been pronounced in some measure proprietary by express enactment of the Legislature, in Reg. XVII. of 1827, Sec. VIII. Now certainly the tenure alluded to in that section, presents one or two salient points of correspondence with the khotí tenure. The subjects of the section possess an hereditary right to settle for the revenues of their village in the gross; but the bulk of the allusions in this section are to the Court unintelligible when applied to the khotí tenure. In the first place the subjects of the section are designated 'shareholders of villages,' and they are said to be jointly responsible for the revenue. Now a khot's interest, like most Hindú interests, may, no doubt, be held in shares, but there is no essential necessity that it should be so. And when it is held in shares, it seems to be the practice for the Government sometimes to hold one sharer responsible for the whole revenue, as the representative of all the sharers, and sometimes each for his share; but we hear nothing of their hold-

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ing each sharer responsible not only for his own share, but also for the whole revenue due from all the other sharers; and this is the real meaning of joint responsibility. The tenure is then said to involve peculiarities in the occupancy, disposal, and assessment of lands, and in the collection of the revenue; but though these points may have afforded fertile subjects of dispute between the khot and his tenants, yet they are not touched by any features in the tenure. The khot's position towards his tenants is as simple as the position of Government. Indeed it is the same thing. Lastly it is said, on a final failure of payment of the Government rent, 'the land shall revert to the Government, unaffected by the acts of the shareholders, or any of them, so far as the public revenue is concerned, but without prejudice in other respects to the rights of individuals,'—words that are without meaning when applied to the khots, for a reversion to Government involves in their case the annihilation of all rights dependent on the tenure.

"The Court is less inclined to strain the section in question to fit the case of khotí tenure, from the facts of its fitting in an easy and natural manner the case of certain tenures in Gujarát, viz., the bhágvár, narvádár, and perhaps others. The bhágvár tenure, for instance, as described in Colonel Monier Williams' Memoir of Baroche, appears to be roughly as follows:—The village is divided for revenue purposes, by its own corporate authority, into shares called bhágs, and sub-shares called áṇás. These are not specific terms of measurement; for the component parts of the different bhágs may be intermixed, and soil and situation are taken into consideration in the constitution of an áṇá. In this way the áṇás are rendered of equal value, and the liability of each holder of land for his share of the Government revenue is determined among the villagers themselves by the áṇá estimate of his holding. The Government, having apparently no cognisance of the bhág and áṇá system, estimate their demand for rent at a certain rate on the number of cultivated bighás in the village, and settle for the gross total with the principal shareholders or bhágdárs.

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These collect from the villagers according to their holding per áṇá. The bhágdárs are jointly responsible for the whole revenue, each sharer being as it were a security for the others. It further appears that generally the whole land in the village is not included in the bhágs; but the bhágdárs, as representing the village community, have the disposal of the extra land. They lease it to the best advantage, and the rents are applied to the satisfaction of the Government demand; thereby reducing the amount which the real shareholders will have to pay per áṇá on their holdings.

"Now it appears to the Court that this tenure corresponds exactly with the terms of the section in question. Its essence, as the term 'bhágvár' implies, is a holding in shares. The joint liability of the shareholders is its main feature, its object being security to the Government for their rent, and security to the villagers against the destruction of their tenure. The occupancy, disposal, and assessment of the land, and the collection of the revenue, are marked by delicate peculiarities, springing immediately out of the shareholding system. Lastly, the reversion of the lands of the village to Government, and the collection of the revenue by the Collector, 'in the same way as in other villages,' would still leave it possible for the villagers to adjust the burden among themselves according to their bhág and áṇá system. The proviso, therefore, at the end of Sec. VIII., so unintelligible when applied to the khotí tenure, becomes quite intelligible when applied to the bhágvár. Indeed it was indispensably necessary, for otherwise the introduction of the government system of collecting revenue at bighá rates, in a bhágvár village, would be calculated to cause a *bouleversement* of the whole rights of the villagers among themselves.

"It appears, therefore, to the Court that the law in question has no application to the khots. But it may be asked, What law, then, does apply to them? To this question the Court is disposed to agree in the answer given by the counsel for the appellant. The law is silent on the khot's rights; and when it is considered how anomalous is the posi-

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tion of an hereditary farmer of revenue, how subversive of the ideas of property in land as cherished by the villagers, and how obstructive to an improvement in their condition, the Court is not surprised that the perpetuation of the system has not been secured by the Legislature, and that the rights of the parties interested have been left to be cared for by the consideration of the executive government, and the equitable principles enforced by the Civil Courts.

"What difference, then, is made by the decision that the khots have no proprietary right in the soil of their villages, but only an hereditary right to farm the revenue.

"It appears to the Court that, if the primary object of the khot's right were a portion of the produce of the soil, his management of the village could be looked upon only as the prescribed means to effect the realisation of that portion. And, therefore, although the cessation of that management would involve, for the time being, the non-realisation of the khot's portion; yet, unless his right was lost by disuse for thirty years, he would necessarily be entitled at any time to claim back the management as the only means of placing his hand on the portion of the produce which belonged to him. His interest in the village would be property, in a most anomalous and inconvenient form, but still property. And this view seems to be sanctioned by Reg. XVII. of 1827, Sec. 3. The khot would be in the position of a superior holder, and it is nowhere hinted, either in that section or in Sec. 6, thathis failure to settle with Government would do more than suspend his right.

"But if, as the Court has held, the khot's right is the hereditary farming of the revenue, the living principle of that right would not be property inherent in the khot, but a perpetually running contract with the State. And although it would be in the power of the khot, by perpetually fulfilling his part of the conditions, to keep the contract alive, yet it would nevertheless expire on any breach of the conditions. The terms of the contract are that, on the one hand, the Government should give up to the khot its right to all legal

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collections above a certain fixed sum; and, on the other hand, the khot should pay that fixed sum, and relieve Government of all risk and trouble. To hold that the contract is binding on the Government and not binding on the khot is inequitable, and puts the Government in a false position. It must naturally be a troublesome thing for Government to apply the machinery of assessment and collection to a village unused to Government management; and that they should have to do so at the bidding of the khot, and withdraw at the bidding of the khot, and refrain in the mean time from using their legal power to improve the system of assessment &c. according to the progress of ideas, in order that the khot's rights might be kept intact till it suited his convenience to resume them, appears to the Court to be assigning to Government a position inconsistent not only with its dignity, but with the nature and object of Government.

"It is argued, however, that the Government have always, as a matter of fact, assumed and restored the management of the village at the pleasure of the khot; and that, as a gift is not to be presumed, it must be held they acted from legal necessity. But this presumption is not conclusive, and in the Court's opinion it has been rebutted by the general facts of the case, which establish that each restoration by Government of the khot's rights has been a separate act of indulgence, mixed probably more or less with expediency. The Court cannot agree with the Assistant Judge that the Government have slumbered on their rights.

"All the preceding remarks have been intended to explain the Court's general decision, that a khot having once thrown up the management of his village, has no right to demand it back. But this decision must now be applied to the particular facts of the case.

"Has the plaintiff thrown up the management of her village? is a question of fact to be settled. Her representative, the mortgagee, certainly declined to pass the yearly kabuláyat in 1851-52; but what significance attached to that fact? It did not necessarily signify throwing up the manage-

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ment, because it might have been done with the express or presumed permission of the Government. There was no express permission, but there had been a long and invariable usage implying such permission. The Court finds it impossible to deny that this usage must have affected the understanding on which the management was given up by the khot, and accepted by the Collector. Were it shown that there had been any warning given to the khot to counteract the effect of this usage, making it clear that his right of restoration would be disallowed, or even would be questioned, then the Court would have held that the khot acted with his eyes open, and must take the consequences. But as the facts stand, the Court cannot help suspecting that, had not the khot been misled by the usage, he would never have relaxed his hold of the khotship. Although, therefore, the Court holds that the Government can, by a notification of its intentions, prevent a recurrence of claims similar to those of the plaintiff, yet the claims of the plaintiff must be treated in the mode hitherto prevailing, and which Government, through invariable usage, may almost be said to have promised.

"It appears that five years ago the Collector gave the khot the chance of resuming his khotship, on payment of all Government loss during their direct management, and as the khot refused to accede to these terms, it might be said that his right to resume then terminated. But the loss which the Collector required the khot to make good was disconnected with his khotship, and arose entirely from the direct management of plaintiff's khárs. Now the plaintiff's rights over the khárs as shilotridár are, the Court think, quite distinct from his khotí rights—distinct in nature and distinct in origin. And although it appears that his liability as khot and as shilotridár was secured by the same kabuláyat, yet, in the Court's opinion, the two things are independent of each other, and therefore the khot in this case was justified in refusing the terms offered by the Collector.

"The Court then decides that in the present case the

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plaintiff has a right to resume the management of her village, on a ground independent of the general nature of a khot's rights. But the examination of that question was necessary, as there is a complication to be dealt with. During the direct management of the village by Government, the Revenue Survey assessment has been introduced. Is the plaintiff, then, at liberty, on resuming her khotship, to set that assessment aside, to hold the engagements entered into between the Government and the ryots as void, and to return to the old and bad practice of collecting what the khot chooses to call the half or the third of the actual produce of each field?

"The Court thinks not. Under the view above laid down, although the Government was pledged to restore the management of the village to the khot; yet it held it in the mean time in its own right, and not as the trustee for the khot. It was, therefore, free to manage the village as it pleased, and in the same way as the non-khoti villages. This was a risk the khot ran when he withdrew from his post; and yet it was really no risk at all. The survey assessment was not introduced on a sudden, and in the dark. The operations commenced in 1855-56, and finished in 1859-60. If the khot wished to oppose the survey, he should have forced the restoration of his rights when the survey was threatened, instead of waiting till it was an accomplished fact. It may be said that the Court is dealing with a question which would naturally arise between the khot and the ryots, and to which the Government are no party. But the Court holds that it is a question in which the Government are interested, through their reversionary right to the khotship, whether with a view to future revenue prospects, or to the well-being of the village community, which may equally be considered the concern of Government.

"The Court, therefore, amends the Assistant Judge's decree, and decides that the plaintiff may, on paying any Government loss, resume her khotship, subject to the necessity of observing the engagements entered into between the Government and the tenants, through the Revenue Survey,

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whether as regards the rates of assessment or the rights of tenancy.

"Regarding the plaintiff's claim to restitution of her shilotrí haks, as above observed, the Court holds that her rights stand on a different footing. They are essentially proprietary. The term shilotrídár is derived from *shel*, an embankment; and the shilotrídár is the representative of the person whose labour or capital in the construction of *shels* has reclaimed land from the sea, and, as far as cultivation and consequent revenue go, has really called it into existence. The plaintiff's rights are secured by *kaúl*, and no argument has been put forward to prove their extinction, except the failure to pay the Government rent. But if plaintiff is now ready to make good all Government demands for rent, the khárs must be restored to her.

"As regards the one and a half khárs, therefore, the Assistant Judge's decree is affirmed: costs on appellant."

The grounds of objection taken to this decree on special appeal were as follow:—

That it is contrary to law, in that: (1) The Judge has erroneously held that the Collector, during the years of direct management by himself of the khotí in question, did not manage as trustee for the khot, but independently, by virtue of some right inherent in Government; (2) the Judge has erroneously held the applicant liable for not having claimed the khotí in question previous to the introduction of the Revenue Survey, his failure in that respect having nothing to do with the merits of the case; (3) the Judge has erroneously held the applicant bound by the contract alleged to have been entered into by Government with the ryots, such contract, if made at all, not being such as should be allowed to operate to the prejudice of the applicant's right; (4) the Judge has gone beyond the subject-matter at issue between the parties to this suit, which was simply the right of the applicant to have the khotí in question returned to him, and not the terms and conditions the applicant should observe towards the ryots,—this being a matter affecting the appli-

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cant and the ryots alone. II. That there has been a substantial error in law in the investigation of the case, which has produced an error in the decision of the case on its merits, in that: (5) the Judge has failed to inquire as to the condition of other khots, in whose villages the Revenue Survey rules have been introduced; and more particularly with respect to the other half-sharer of the khotí in question, to whom Government has granted greater privileges than those allowed the applicant by the Judge; that (6) the Judge has failed to determine the amount of loss sustained by Government during the years of direct management by the Collector of the khotí in question; or whether, in calculating the same, the applicant should have credit for any profits that may have accrued during any particular year of this direct management, or on any particular item of the khotí.

Anstey, McCombie, Vishvanáth N. Mandlik, and Mádhavráv K. Khárkar for appellant.

White and *Dhirajlál Mathurádás* for respondent.

Cur. adv. vult.

The judgment of the Court was delivered this day (ARNOULD, J., concurring) by—

NEWTON, J.:—This was a suit by a khot to compel the Sub-Collector of Kulába to restore to her the management of a half-share in a khotí village, and also one and a half khárs which she claimed as a shilotrídár. It has been found that both the khotí and shilotrí rights were mortgaged by her deceased husband in 1845-46, and that, on the failure of the mortgagee to pass the customary agreement (kabuláyat) for the security of the revenue, in 1851-52, the Sub-Collector took the half-share of the khotí and shilotrí haks directly under Government management. In 1860-61 the plaintiff paid off the mortgage and claimed restoration of her rights; and on the Sub-Collector's refusal to make restoration, she instituted this suit.

The Courts below have decreed absolutely for the plaintiff with respect to the shilotri khárs, and as regards them,

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therefore, no question has been raised for our consideration. The plaintiff's right to them is based on grounds entirely distinct from those on which she claims the half of the khotí —as distinct necessarily as are the khotí and the shilotrí tenures.

But, the award for the plaintiff's restoration to her half-share of the khotí having been given on special grounds, the Judge has decreed that she reënter, only on the condition of reimbursing Government for any loss sustained by her absence, and observing the rights of cultivators as guaranteed at the Revenue Survey, which has been meantime carried out. The Sub-Collector does not oppose her restoration on these conditions; but, as she objects to them, it becomes necessary, in order to determine whether she can claim reëntry unfettered by the terms imposed, to inquire into the character of her rights as khot.

The question may be stated as being in effect, whether as khot she possessed a proprietary right in the *soil*, or was merely an hereditary farmer of the revenue;—or, more explicitly: (1) Whether as khot she retains a right to reënter on the management of half the village of Pegode, after having abandoned it for several years, during which it was conducted by Government; (2) whether she is bound to conform to the revenue settlement made by Government with the cultivators in the interval.

On looking to decided cases for assistance in determining these points, we find that, though disputes between individual claimants to khotships have on several occasions formed the subjects of litigation, no decision appears to have been given by the late Ṣadr Court or by the High Court as to the right of a khot as against Government.

Nor do we find any express law applicable to the case, except the provisions of Reg. XVII. of 1827, Chap. VI., which are applicable to farmers generally. Sec. VIII. of that Regulation has been held by the court of original jurisdiction to include the khotí tenure; but we cannot concur in that

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opinion. The holdings to which the provisions of that section relate are those to which the element of "shareholders" is essential, as the tenures of bhágdárs and patidárs with joint liability in Gujarát. In a khotí village the circumstance that there are shareholders, when it exists, is an accident resulting from the operation of the prevailing laws of inheritance. The class of holdings, respecting which this section provides for the realisation of the revenue, "without destroying the tenure," seems to be the same as those for the preservation of which it was subsequently found necessary to pass the Bombay Act No. V. of 1862, on the ground, as stated in the preamble, that the permanence of the tenures was endangered.

No lease or titledeed of any kind is relied on. It is admitted that a khot is a farmer of land revenue, and, further, that the right has now become hereditary. This result was to be expected in a country in which from time immemorial the succession of a son to his father's occupation has always been looked upon as the natural and fitting arrangement. It has been pointed out to us that at so late a date as A.D. 1808, in cl. 2, Sec. XVIII. of the Bombay Reg. I. of that year, the term "khot" is defined as a temporary farmer, to whom the lands were let out annually; but from the context it does not appear that this definition was considered to be applicable at the date of the Regulation, though Sec. XX. shows that it applied down to A.D. 1788 in the island of Salsette.

The material facts found in the able judgments of the courts below with regard to the tenure appear to be the following:—1*st*, Since 1819-20 khots have been required annually to enter into formal agreements, in which they engage to make good to Government the fixed sums at which the revenues of their khotís are assessed:—2*ndly*, A limit is fixed by custom to the demands of the khot against the actual cultivators; and the khot, while a gainer if he can realise more than the fixed sum due to Government, is a loser if unable, on account of unfavourable seasons or other causes, to exact that amount:—3*rdly*, As the khot settles

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with Government for assessment of the village as a whole or for his share in it, it follows that he may let out for cultivation, or himself cultivate, without making any additional payment to Government on that account, any waste or uncultivated land of the village. If, however, he fails to contract by kabuláyat for the fixed assessment for any year, and the duty of realising the revenue thus devolves on Government, he pays the half or the third (as may be customary) of the produce of land so cultivated by him, as any ordinary ryot:—*4thly*, As a matter of fact, whenever a khot, after failing for some years to execute the usual kabuláyat and pay the fixed assessment, has applied to be restored to the management, Government have always acceded to the application; *5thly*, In such a case the khot is required, before restoration, to make good any loss which Government may have sustained in collection of the revenue, during the years in which he failed to pay it; but if any profit has accrued to Government, it is, as a rule, retained; *6thly*, The rights of a khot are commonly transferred from one individual to another by sale or otherwise.

Do these facts establish more than is admitted, namely, that the plaintiff had an hereditary right of farming the half of the village of Pegode, as long as she continued annually to enter into the customary agreement? Do they prove that she as khot had any such proprietary interest in the village, as would authorise her to claim restitution of the half-share unconditionally, after failure during several years to discharge the office of khot? We think not. We think, further, that some of the above facts militate against the title alleged by the plaintiff.

The fact of most apparent value for the purpose of showing that a khot has more than an hereditary right to farm the revenues of his khotí, dependent on his execution of the annual security for the amount, is the circumstance that when a khot has thrown up the duties of his office for a time, he has invariably, except in the present case, been restored to it on application. This fact is deprived of almost all its force as the groundwork of an argument in the plaintiff's

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favour, by the consideration that the same motives of convenience, which originally led to the farming of the revenues of those poorer and more isolated villages of the Konkaṇ—where the population is so little advanced that even down to the present date the assessment is, it appears, payable in kind,—may have induced the Government readily to accept the proposals for reëntry made by a farmer whose *right* to reenter, it would not have acknowledged; and it seems that the Peshwa's government did not hesitate to eject khots when it suited its convenience.

The only other ground on which an argument favourable to the title alleged by the plaintiff can be founded, is the circumstance that a khot's rights are commonly made the subject of mortgage, sale, or other transfer; but that the existence of such power of transfer does not establish the right asserted, is clearly shown by the fact that the right of occupancy of *gatkuli* land,—which also is hereditary and transferable, and indefeasible as long as the assessment is annually paid,—is yet a right, the continued possession of which is conditional on due payment of the assessment.

On the other hand, the fact that Government, on reinstating a khot, retains any profits which may have accrued from the management of the village or share during his failure to act as farmer, strongly negatives the supposition that Government in such a case act as trustee for the khot during his absence; while it confirms the conclusion already drawn, that Government reinstates a defaulting khot, not as admitting his right to be restored to the vacated office, but because it has hitherto been inconvenient to enforce the forfeiture.

So, again, the annual execution of a *kabuláyat*, and the terms of those documents must be considered as rather opposed, than favourable, to the claim set up by the plaintiff.

And an incident which seems conclusively to show that a khot possesses, with reference to the lands within his khoti, no rights which are not dependent on the continued exercise by him of his functions as a farmer of the revenue, is the

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fact, found by the court below, that although a khot, while in office, may dispose of available land for his own benefit, or cultivate it himself, he becomes liable, in the latter case, for the full amount of assessment as an ordinary cultivator, whenever he ceases to discharge the duties of his office. The right to cultivate such waste or other lands as may be at the khot's disposal, or to give them out in cultivation under such terms as may be most to his advantage, must consequently be viewed as the recognised mode of his remuneration for the services rendered.

The most, therefore, that the plaintiff has succeeded in establishing, is, that down to 1851-52 she possessed an hereditary right to farm the revenues of half the village of Pegode, dependent on the performance by her, from year to year, of the duties discharged by a khot with respect to the realisation of the revenue and otherwise; and the lower appellate court having for special reasons decreed that she be restored to the management of the share of the khoti, we do not consider that she has made out any right to object to the conditions on which reëntry has been awarded,—namely that she pay any loss which Government may have suffered through her default, and observe the engagements entered into between the Government and the tenants, through the Revenue Survey, whether as regards the rates of assessment or the rights of tenancy.

We affirm the decree of the Judge; and order that the costs of this appeal be borne by the special appellant.

TUCKER, J.:—This suit was instituted to recover a moiety of the khoti estate in the village of Pegode, and also certain lands styled khárs, *i.e.*, reclamations from the sea, which it is stated belonged to the plaintiff, but had been taken possession of by the revenue authorities ten years prior to the institution of the suit.

So far as the khárs are concerned, decrees have been given by both the lower courts in favour of the plaintiff; and with reference to this portion of their decision no special appeal has been made to this court: so it is only with the khot estate we have to deal.

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The court of first instance (H. Birdwood, Assistant Judge of the Konkaṇ) decreed to plaintiff the restoration of the khotí estate absolutely, on the payment of any losses which may have been sustained by Government during its interim management; but this decree was modified by the lower court of appeal (C. Gonne, Joint Judge of the Konkaṇ), by annexing to the restoration a condition that the plaintiff was to observe the engagements which had been entered into between Government and the sub-tenants of the estate, through the Revenue Survey, whether as regards the rates of assessment or the rights of tenancy.

The case was argued before us by Mr. *Anstey* for the plaintiff, and Mr. *White* on the part of Government; and it was contended by the former that, the lower appellate court having substantially admitted in its judgment that the plaintiff had a valuable estate or interest in the village, of which she could compel the restoration, it was not competent to the said court to add to the restoration a condition that the plaintiff was to abide by any arrangement or settlement which the Government might have made intermediately with the sub-tenants, to which she was no party; and further that, in taking an account of the management of this estate, the lower courts should have directed the plaintiff to be credited with the profits that had been made by Government in any particular year, to set off against the losses in other years, for which she was made responsible.

Mr. *White*, on the other hand, contended that, as plaintiff was a mere farmer of the revenue, who entered into an engagement with Government annually, Government had a right, during her temporary abandonment of the farm, to make such arrangement with the actual cultivators of the soil as it pleased; and the plaintiff, when re-admitted to the farm, would be bound by the settlement which had been made in the interim.

The main question which we have to determine depends upon the nature of the estate possessed by the plaintiff in the village. If this was definite and permanent, and partook

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in any degree of a proprietary character, and if it comprehended a right of reëntry after temporary abandonment, it seems to me that, while this estate existed, no change could be made in the relations between the khot and the inferior tenants, which would be binding on the khot after restoration, unless the khot had previously assented to the intermediate settlement made by Government, or had subsequently ratified it. In other words, if the plaintiff was entitled to demand the restoration of the estate, it seems to me that she was also entitled to require that it should be returned to her in its integrity.

The description which the Joint Judge has given of the khotí tenure, as it exists in the South Konkaṇ, founded chiefly on the evidence of Mr. George Scott, a revenue officer of experience, who was the principal witness brought forward by the Sub-Collector, appears to me to demonstrate conclusively its proprietary character.

Though the khot is styled a farmer of the revenue, who is obliged annually to sign a kabuláyat, or written agreement, in which the conditions on which the village has been leased are recited, and to give security for the annual revenue due to Government, yet it is admitted that he has an hereditary right to hold this farm, and can transfer his interest by sale or mortgage. It is also acknowledged that he can abandon this farm temporarily, at the conclusion of any year, if he pleases; but that he is entitled to readmission, on paying up any losses which may have resulted to Government during the time he has been out of occupation. It is further admitted that the revenue which he has to pay is a fixed grain rent, which can only be altered on a general survey of the district, and that he may levy rents from the occupants of the soil who are not *dhárekaris*, in excess of the Government demand, subject only to the limit which has been sanctioned by general usage. It was also allowed by Mr. White, in the course of the argument, that during the existence of the farm he had full proprietary rights over the lands which were unoccupied at the first creation of the

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farm, and which had been brought under tillage through his agency. Now, an interest in land which is heritable, alienable, and includes a power of disposal over particular portions of the soil, and also a capability of restoration after temporary relinquishment, possesses all the essential characteristics of proprietary right; and an estate composed of these ingredients cannot be said to be defective in any of the elements which ordinarily constitute property in land. An hereditary right to farm a particular tract of land, on payment of an assessment which can only be varied under certain determinate circumstances, is a proprietary estate in the said land, though the possession of that estate may not confer unrestricted dominion over the whole or any part of that land, and though the estate itself may be limited by the estates which other persons have acquired in portions of the said land, or in the entire territory.

In Captain Wingate's able Report on the Ratnágirí collectorate in 1851, which has been published by the Government of Bombay in its printed Selections, Part II., it is stated that the khotí tenure originated in the times of the Bijápúr kings, and that it had grown into a regularly established and acknowledged right of farm. It would seem that in 1819 and 1820 and in 1821 and 1822 our chief revenue authorities in that district, whose Reports are quoted by Captain Wingate, were of opinion that the khots possessed an absolute proprietary right over the entire lands in their respective villages; but afterwards the extent of this right came to be questioned, and it was contended that there were tenant-rights vested in certain classes of occupants, which limited the khot's rights. Captain Wingate, who was a strenuous supporter of the latter view, appears to have admitted that in a certain description of lands, which he styles *gávík*, a khot's right of disposal was unrestricted; so that, if we accept his view of a khot's interest in his village, it was undoubtedly proprietary in its character.

I confess I do not understand what property in land means, if an hereditary and saleable right to a farm, added to a power of disposal over a portion of the lands included

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in the said farm, does not constitute a proprietary right. That such interests are esteemed property, and valuable property too, is proved beyond dispute by the numerous suits which have been brought to obtain possession of a share in these estates, since the British occupation of the country.

The origin of a khot's estate seems to be precisely the same as that of the zamindar's in Bengal, to whom absolute dominion was given by the permanent settlement of Lord Cornwallis; but though the non-recognition of tenant-rights on that occasion may have been an error, and in my humble judgment it was an error, yet the existence and recognition of such tenant-rights cannot divest the mesne or intermediate estate of its proprietary character. In the lands where the tenant-right existed, the khot would have a reversionary interest, if the occupant abandoned them, or refused to pay the prescribed rent, and over the other lands his ownership would be complete. It seems to me, then, that there is some confusion of thought in the conclusion that an estate which involves incidents of this kind is not a property in land.

If I had entertained any doubt of the proprietary character of a khot's estate in a khotí village in the South Konkan, it would have been removed by the words used in Reg. XVII. of 1827, Sec. VIII. (*a*), from which it would appear that

(*a*) The section referred to is as follows :—

Clause 1 :—" Nothing contained in any of the preceding sections shall be understood to affect in any way the peculiarities of the tenures of shareholders of villages settling hereditarily and by right for the revenues of their villages in the gross, and thus possessing in some measure a proprietary right in the land of their villages; the said peculiarities shall be respected and preserved, whether they relate to the occupancy, disposal, and assessment of the lands of the village, the collection of the revenue, and the joint liability of the shareholders, or to the intermediate steps prescribed by the terms of the tenure and by local usage for the purpose of realising of revenue in the case of non-payment without destroying the tenure."

Clause 2. " Provided, however, that the land and its crop shall, in these villages as well as in others, be held to be ultimately liable for the revenue; and that when the shareholders fail to pay such revenue, and the intermediate steps in such cases prescribed by the tenure and the local usage have been inefficient, it shall be competent to the Collector to manage the said villages in the same way as others, and the lands of any such village shall then revert to the Government, unaffected by the acts of the shareholders, or any of them, so far as the public revenue is concerned, but without prejudice in other respects to the rights of individuals."

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the Legislature of that day considered that persons settling hereditarily and by right for the revenues of a village in the gross, did possess in some measure a proprietary right in the land of such villages.

I am unable to concur with my learned colleagues that the provisions of this section are not applicable to a person in the position of the plaintiff in this suit. She is a shareholder in a village divided into shares, who settled hereditarily and by right for the revenues in the gross, and as such is entitled to have all the peculiarities of her tenure respected and preserved, whether they relate to the occupancy, disposal, or assessment of the lands of the village.

The terms of the enactment are general, and she clearly comes within the words, so that she is entitled to benefit by the protection which the statute affords. It may be that the framers of this Regulation had in contemplation more especially the bhágdárí and narvádárí tenures of Gujarát, though the fact that, in the Maráṭhí translation published by the authority of Government, the words "watní khot" are actually used, renders the conclusion somewhat doubtful; but there is nothing in the language of the Regulation which limits its operation to the Gujarát landholders above named, who are nowhere specifically mentioned; and I conceive that under no just principle of interpretation can the plaintiff be excluded from any advantage which the law in question confers. The circumstances that a khotí estate may sometimes vest in a single individual, and that it does not necessarily always comprehend any joint liability, are not, in my judgment, sufficient reasons for concluding that the proprietors of such estates did not come within the scope of this law. An estate of inheritance, following the Hindú law of succession, will usually descend to a body of shareholders; and at the time when the Code of 1827 came into operation, a large majority of the khotí holdings (which in the Ratnágirí collectorate amount to more than nine-tenths of the entire number of villages in the district) (*b*) must have been in the occupation of groups of coparceners. It is a signi-

(*b*) Captain Wingate's Report.

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ficant fact that in the court of first instance, the defendant, the Sub-Collector, founded his assertion that the village had reverted to Government on the second clause of this particular section of the Regulation, so that at that time he appears to have had no doubt of the applicability of this law to khots. Mr. White was unable to explain this change of opinion on the part of the defendant.

Mr. White, in his opposition to the plaintiff's claim, mainly relied on the fact that an annual agreement being passed by the khot to the Collector reduced his estate to little more than a tenancy from year to year. It appears to me, however, that the proposition cannot be maintained. The agreement appears to have been introduced by the British Government for the preservation of the conditions of the lease, and in order that the payment of the annual revenue or rent might be duly secured; and I concur with the Joint Judge in considering that the execution of this periodical agreement by the lessee does not alter the character of a khot's estate, though it is certainly a peculiar incident. It is worthy of remark that the practice of requiring this agreement is said to have commenced in A.D. 1819-20, at which time the absolute proprietary right of the khot in the entire lands of the village was recognised by the revenue authorities. (*c*)

A watandár khot, whatever may have been his origin, has acquired by prescription an hereditary right to enter into this agreement, and to hold the village under the customary conditions of his tenure; and this right cannot now be resisted, so long as he performs those conditions. In the present case the Sub-Collector has refused to allow the plaintiff to subscribe the annual agreement, or to resume the position of a khot, until she shall acquiesce in certain settlements which the Sub-Collector has made with the occupants of the subordinate holdings, fixing the assessment to be levied in future from those ryots for a long term of years. The attempted imposition of the condition is an admitted

(*c*) *Vide* Captain Wingate's Report, paras. 20, 21, and 22.

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innovation; and the existence of no law or usage has been alleged, much less proved, which authorises such a proceeding. I hold, therefore, that the plaintiff is entitled to enter into this engagement, and to reënter upon the khotí estate, on the payment of any losses which may have been incurred by Government during their intermediate management.

The counsel for the special appellant has contended that, in taking an account of these losses, the plaintiff should be credited with any profits which may have been realised by Government during any portion of the term during which the khot's estate was under attachment; and it certainly seems to me only equitable that this should be done. If a khot's interest in a khotí village be a complete estate (which I hold it to be), from the management of which a khot may withdraw, with a privilege of resumption on payment of losses, there can be no just ground for the retention on the part of the Government of any surplus profits which may have accrued during any part of the period of management; and I should not have been disposed to uphold the practice, even though, as Mr. Scott deposes, it may have been for a long time prevalent in the Ratnágirí collectorate, as it would seem that in the Kulábá sub-division, in which the village which forms the subject of this suit is situate, a more equitable settlement of accounts has been permitted in at least four instances. But I consider that this point cannot be entered upon in the present special appeal, as the appellant raised no contention on this ground in the lower appellate court, but would seem to have acquiesced in the Assistant Judge's decree. This particular objection must be held, therefore, to have been waived, and the question cannot be reopened in this special appeal.

For the reasons I have given above, I am of opinion that the District Judge committed an error in law, in adding to a decree for the restoration of plaintiff's estate, a condition that she must be bound by the settlement which had been made by the Sub-Collector when the estate was under attachment, and to which she had not assented; and if the decision of the cause had rested with me, I should have re-

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versed that portion of the District Judge's decree, and have affirmed the decree of the Assistant Judge, and have made the defendant, the Sub-Collector, liable for plaintiff's costs in all courts.

I may remark that the opinion which I have given with respect to the rights of a watandár khot coincides with a judgment which I passed when Judge of the Konkaṇ in 1863, in the case of the *Conservator of Forests* v. *Bálkrishṇa Soïru Tipnis*, Appeal No. 541 of 1862.

In the argument at the bar, allusion was made to Reg. I. of 1808, Sec. XVIII., cl. 2, in which the khots in Salsette are described as temporary farmers, and very bad and exacting landlords. From Sec. XX. of the same Regulation we learn that in the year 1788 it was proposed by Mr. Farmer, who was then in charge of the island, "to encourage persons to pursue the cultivation and general improvement of the Company's villages, by ensuring them and their heirs for ever the fruits of their labour and expense, and at the same time securing to the Company, as lords of the soil, a fair participation in these improvements," so as, in his idea, "to convert the system of needy adventurers and temporary farmers into one of permanent zamindars." The Court of Directors of the late East India Company, though inclined to concur in Mr. Farmer's suggestions, required further information before assenting to any final or permanent system. It would seem to me that lapse of time, and the tacit acquiescence of Government, have effected for the watandár khots of the South Konkaṇ, the conversion which Mr. Farmer wished the Court of Directors to make in the case of the temporary farmers of Salsette.

The decree in this case will follow the decision of the majority of the Court, but I direct that my dissent be recorded.

Decree affirmed.

Special Appeals Nos. 115 *and* 840 *of* 1865.

MUHAMMAD valad A'BDUL MU'LNA' .....*Appellant.*
IBRAHIM valad HASAN and others .....*Respondents.*

Religious endowment—Mortgage—Redemption—Secondary evidence—Stamp—Remand.

In a suit brought by A, to recover a half-share in certain ancestral land, which he claimed, first by right of inheritance, and secondly under a deed of settlement executed by the other half-sharer, B, since deceased, the widow of B answered that the whole of the land had been assigned for the support of a mosque by B's father; and the lower appellate court found that it was so, and reversed the decree of the Munsif, who had allowed A's claim :—

Held, on special appeal, that the document relied upon as creating an endowment had been improperly admitted in evidence; it being only a copy, and the absence of the original not having been accounted for; the Court further observing that the document only purported to be a mortgage, and did not create any religious endowment.

And, on the suit being remanded, the lower appellate court found no reason to alter its former decree; the absence of the original mortgage deed, executed in A.D. 1834, having been accounted for; and a second deed, bearing date A. D. 1846, having been produced, by which B's father assigned the whole of the land in dispute to the *jamát* of the community as trustees of religious property :—

Held, on a second special appeal, that the deed of 1846, being unstamped was inadmissible in evidence; and that the deed of 1834 being only a mortgage, the equity of redemption was not lost, notwithstanding the failure of the condition that the property was to be considered as sold if the mortgage debt was not paid before A.D. 1846.

Rámji v. *Chinto*, 1 Bom. H. C. Rep. 199, followed.

The Court also, finding that the lower appellate court had not determined material questions of law and fact necessary for the decision of the suit, framed certain issues for its guidance, and again remanded the case.

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THIS case first came before the court as a Special Appeal (No. 115 of 1865) from the decision of A. T. Crawford, Senior Assistant Judge of the Konkan at Ratnágirí, in Appeal Suits Nos. 200 and 234 of 1864, by which he reversed the decree of the Munsif of Ratnágirí in the Original Suit.

Muhammad brought the suit: claiming his one-half share of a certain ancestral thikán, regarding which the infant defendant's deceased father, Hasan, had passed him a deed.

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A'isha, the widow of Hasan, and guardian of the infant defendant, answered that the thikán had been given for the support of the masjid by Hasan's father, Isák, and, having been so appropriated, that no division of it could subsequently be made.

Certain other persons were made defendants as representing the Bhusári Muhammadan community.

The Munsif decided in favour of the plaintiff: finding that the thikán had not been given over to the masjid; and that the agreement executed by Hasan in plaintiff's favour was valid.

A'isha then appealed to the Senior Assistant Judge: urging that the agreement had been obtained by fraud from Hasan, who was a person of weak intellect. The representatives of the community also appealed: alleging that the thikán had already been given over to the masjid by Isák; and that the subsequent deed, obtained by fraud from Hasan, was invalid.

The following judgment was recorded on the 21st of October 1864:—

"The issues for decision are: (1) Whether the thikán is the common property of the Muhammadan community, and allotted to the support of the mosque, or whether it is the ancestral property of the defendant No. 1; (2) If the latter, whether the agreement, alleged to have been executed to the plaintiff by the deceased Hasanji, is trustworthy and valid.

"On the first issue, I find that the thikán is now the common property of the Muhammadan community, and allotted to the mosque. I have already, in a former suit, declared that by Muhammadan law such land cannot be divided. I, therefore, reverse the Acting Munsif's decree, and throw out Muhammad's claim, with all costs upon him.

"The representatives of the Muhammadan community have put in a certified copy, from the Zilláh Register, of a deed executed to them by Isákji, the grandfather of the infant defendant, in whose name the thikán stands. On a reference

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to the original register and the receipt book in the court's records, I have ascertained beyond all doubt that such a deed was executed by deceased Isákji. It was he who presented it for registration, paid the fees, and received it back again. By the terms of that deed the Muhammadan community acquired a title *in toto* to the land in dispute, to which it had always a partial claim. No subsequent deed executed by his descendants will vitiate the transfer. It is clear, from the papers in this case, that A'ishá, on the part of her infant son, is allowed to occupy the ṭhikán on the condition of rendering certain services to the mosque."

The first special appeal was then preferred.

Shántárám Náráyaṇ for the appellant.

Páṇḍurang Balibhadra for the respondent.

PER CURIAM (FORBES and NEWTON, JJ.):—The Court finds that the exhibit No. 7 was improperly admitted in evidence by the Senior Assistant Judge; it being only a copy, and the absence of the original not having been accounted for.

The Court, therefore, reverses the decree of the Senior Assistant Judge; and remands the case, in order that the defendants may have an opportunity of producing the original document, or of accounting for its absence; and that a new decision may be passed.

The Court remarks that from the copy of the document it would appear that it is only a mortgage, and that it does not create any religious endowment.

Case remanded.

The case was thus remanded on the 22nd of June 1865, and, in the following September, the Acting Senior Assistant Judge, W. H. Newnham, recorded the following decision:—

"The defendants account for the non-production of the original document by saying that it was consumed in a fire. Witnesses now examined prove that the 'Daldiváḍa' of Goláp was consumed by a fire some fourteen years ago, and in it the house of defendant Kásim Ismáel. Of course, there is no direct evidence that the original document was in his house, and was then consumed, nor could such be expected;

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and any attempt to prove this, after so many years, would render the case suspicious. But this is sufficient to warrant the admission of the copy, No. 7, as the register records prove that such a document was produced and registered in due form; as it cannot be alleged that such original did not exist, and as defendants have done all they can to account for its non-production, there is no reasonable ground for any longer rejecting it.

"As observed by the High Court, the said document, a mortgage of 1834, with condition of foreclosure in twelve years, does not distinctly create any religious endowment. Defendants produce another document (No. 14), deposed to by witnesses, in which (dated 1846, or the year when the condition of foreclosure took effect) Isákji, after reciting the contents of the former deed, No. 7, assigns the property altogether to the jamát, or committee of the Musalmán community. This deed, if proved, vests the land in the jamát as trustees of religious property. (It should be remarked that Isákji was himself one of the jamát, as well as the private donor in this deed.) Plaintiff's counsel takes objection to this document, and asks, plausibly enough, how it comes that this was preserved when all the other property, including deed No. 7, was destroyed by the fire; and this is not explained. But whether this document be proved or no, I find the result to be the same. If it is proved—and A'isha has certainly been in occupancy as if it were a genuine one —the property is now a religious endowment managed by the jamát. If it is not, the deed of mortgage, No. 7, has a condition of foreclosure in 1846, and Isákji's ownership then determined, fifteen years before this suit was brought; and the jamát have been since then managing the land as held in trust for the masjid, they having been the original mortgagees. I find no reason to alter the former decree of this court, and reverse the Acting Munsif's decree: costs on respondent."

Against this decision the second special appeal (No. 840 of 1865) was preferred, which came on for hearing this day before TUCKER and GIBBS, JJ.

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Shántárám Náráyaṇ, for the appellant:—The document No. 14, relied upon as creating an endowment in favour of the mosque, was inadmissible in evidence, not being stamped. Document No. 7 was only a mortgage; and the mortgaged property might be redeemed: *Rámji* v. *Chinto*, S. A. No. 299 of 1864. The appellant did not claim under Isákji or his son Hasanji; but claimed a half-share in his own right, and merely relied upon the deed of Hasanji as recognising that right.

Páṇḍuraṅg Balibhadra, for the respondent:—Even though the appellant may claim to have a share in the property independently of Isákji, still he cannot in equity disown the mortgage made by Isákji for the joint benefit of all interested in the property. There was no finding in the judgment of the lower appellate court on the point set up by A'ishá, that Hasanji was of weak intellect, and had been under the undue influence of the appellant.

PER CURIAM:—The Court finds that the deed, No. 14, being unstamped, is inadmissible in evidence; and that, consequently, there is no proof of the grant by Isákji of the land in dispute as a religious endowment; also that, under the deed of mortgage (exhibit 7) executed by Isákji to the heads of the Muhammadan community (defendants Nos. 2 to 12), the equity of redemption was not lost, notwithstanding the entry in the said deed of a condition, that the property was to be treated as sold, if the mortgage debt were not liquidated within a specified term, which expired in A.D. 1846. This point was settled by the decision of the High Court in *Rámji* v. *Chinto*, S. A. No. 299 of 1864 (*a*), which has been followed in all subsequent cases.

The case, then, stands thus:—The plaintiff, Muhammad valad A'bdulji Mulná, claimed a moiety of the plot of land described in the plaint: (1) by general right of inheritance, (2) under a deed of settlement (exhibit No. 3), dated 13th September 1854, which purports to have been executed to him by Hasanji, the son of Isákji, the mortgagor aforesaid; and by which it is alleged that the right of plaintiff to a

(*a*) 1 Bom. C. H. Rep. 199.

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half-share in the said land was acknowledged. The competency of Hasanji to execute a deed of this character has been questioned by the defendant Aíshá, Hasanji's widow, who states that her husband was a man of weak intellect, and that he was duped by the plaintiff; and in her appeal to the Assistant Judge she prayed to be allowed to adduce additional evidence on this point.

The mortgage, under the deed (exhibit No. 7), appears to have been made by Isákji in A.D. 1834, to secure a debt which had been incurred by him to defray the expense of the legal proceedings which he had been compelled to take to recover the land from other persons.

It would seem clear, therefore, that if the plaintiff can establish, independently of the deed by Hasanji, a right to share in the land, which had not been extinguished by the long adverse possession of Isákji, and of those who hold under him, he will be entitled to recover from the mortgagees a half-share in the land, on the liquidation of the half of the mortgage debt; and that if the only right which he can substantiate takes its origin in the act of Hasanji, he can only redeem the land on the payment of the entire mortgage debt: for as Hasanji, at the time he executed the deed No. 3 possessed only the equity of redemption, he could not have conveyed to plaintiff anything more than a share in this equity, which share would only invest the plaintiff with a right to redeem the entire estate.

Such being the position of affairs between the parties, there has been no sufficient determination by the lower court of the issues necessary for the decision of this case; and the Court must, therefore, reverse the Senior Assistant Judge's decree, and remand the suit, that the following issues may be decided:—(1) Has the plaintiff established that he or his ancestors were originally entitled to a half-share in the land in dispute, which was recovered by Isákji from other persons so far back as A.D. 1832; and that, at the time when it is alleged that the deed of settlement (No. 3) was executed by Hasanji, Isákji and his descendants had not acquired a good title against him by uninterrupted adverse

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possession for a term exceeding thirty years. (2) Has the defendant established that Hasanji was of unsound mind, and of such weak intellect as to be incapable of making a valid contract. (3) Has the plaintiff established that Hasanji did execute the deed of settlement (No. 3) for sufficient consideration, and under circumstances which forbid the conclusion that any fraud was practised on him; and if the transaction was honest, but no consideration given, would the deed operate under Muhammadan law as a valid conveyance to the plaintiff of a half-share of the interest which Hasanji then possessed in the property, *i.e.*, a half-share in the equity of redemption only.

The lower appellate court will itself determine these issues, and not refer them to the court of first instance. Each party should be allowed to adduce any additional evidence which may be forthcoming, and the witnesses who were produced by the plaintiff before the Munsif to establish the execution of No. 3 should be recalled, if either party desire it. If the plaintiff be found to have established either of the claims which he has set up, a decree declaring his right to redeem to the extent and on one or other of the conditions, stated in the first part of this interlocutory judgment, should be pronounced.

The amount of the existing mortgage debt cannot be properly settled in this action, which has not been brought for redemption; but should be left for future adjudication, if the plaintiff's right to redeem, in the manner which the Court shall declare, shall thereafter be resisted.

It is not intended that the lower court in giving judgment shall be confined to the issues which have been fixed, if it should appear to the trying Judge, from the disclosure of new facts, or for any other reason, that the decision of other points has become necessary. Costs to be apportioned at the final decision.

Decree reversed and suit remanded.

Special Appeal No. 267 *of* 1865.

FAKI'RCHAND GOVINDRA'M.....*Appellant.*
KAHA'NDA'S BHAGVA'NDA'S .....*Respondent.*

Certificate of Sale—Registration—Judicial process—Act XIX. of 1843—*Reg. III. and IX. of* 1827.

Held that a certificate of sale is not a document of such a character as to be entitled by law to priority, by virtue of its being registered, over an unregistered lease; but that it comes within the class of document described in Reg. IX. of 1827, Sec. III. cl. 2, as "judicial processes," which may at the option of the holder be registered, but the force and effect of which "is in no wise to depend on their being registered."

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THIS was a special appeal from the decision of A. L. Spens, Acting Senior Assistant Judge at Broach, in Appeal Suit No. 24 of 1864, reversing the decree of the Munsif of Hansot, in Original Suit No. 69 of 1862.

The respondent, Kahándas, brought the suit against Govind Devá, to recover possession of some land situate in the village of Dartrái: alleging that it belonged to the holding of Gopál Shivdás, by whom it had been assigned to himself in satisfaction of a debt, payment of which was to be recovered from any profit derived in excess of the Government assessment; and that a deed was subsequently passed to him by Gopál's widow, as guardian of her infant son; that the land had been let by him, under two leases, bearing date respectively 8th July 1851 and 23rd July 1858, to the defendant, Govind, who now refused to pay rent or to give up the land.

Govind answered that he had relinquished part of the land, and that for the remainder he paid rent to Gopál as long as his interest existed, namely, up to Samvat 1817, and since then to Fakír Govindrám (the appellant), who purchased the land at an auction sale. He admitted having taken leases in 1907 and 1914 from Kahándás; but added that he had also taken a lease from Fakírchand Govindrám.

Fakírchand, having been made a defendant upon his own petition, answered that he was the purchaser of the land at a sale of Gopál's interest in it, made at the instance of his creditors; and that his right was recognised in a deed passed to him by Gopál's widow.

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Jairám Bhagván was also made a defendant by the court, as being in possession of that portion of the land relinquished by Govind Devá, to which he claimed to be entitled as purchaser at a sale by Gopál's creditors.

The Munsif of Hansot, holding Jairám's purchase not proved, awarded the land in his possession to the plaintiff; but rejected the claim as against Fakírchand, whose right he considered established.

The plaintiff, Kahándás, then appealed to the Senior Assistant Judge, who laid down the point at issue to be, whether the plaintiff's deed No. 3 was proved; and held that it was proved; and that as Govind acknowledged that he rented this land from the plaintiff, and paid rent to him up to Samvat 1917, he was bound either to give up the land, or continue to pay rent for it according to the terms of the agreement. He also found that Fakírchand never received possession of the land from the court ordering the sale, which took place in 1860; and that Gopál's widow, in collusion with Fakírchand, made over the land to him under a bond dated 17th July 1862, after Kahándás had filed his plaint in this suit. The Munsif's decree was accordingly amended by awarding the whole of the plaintiff's claim.

The special appeal first came before the court on the 23rd of August 1865; and was resumed for further hearing this day, before NEWTON and WARDEN, JJ.

Dhirajlál Mathurádás, for the appellant, contended that the certificate of sale, which was the title-deed of Fakirchand, being registered, although subsequent in date, invalidated the unregistered deed put in by the respondent, under Reg. XI. of 1827, Sec. VI., and Act XIX. of 1843, Sec. II.

Nánábhái Haridás, for the respondent, contended that the certificate of sale put in by the appellant was not of the nature of the title-deeds specified in Reg. IX. of 1827, Sec. III., cl. 1.; that the reversionary interest was all that was left in Gopál after the assignment, and this alone could have been purchased by the appellant. That the sale would have been void as affecting the rights of a party not before the

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court; and registration of such a sale could not render it valid. [NEWTON, J. :—A certificate of sale appears to come within the class of documents specified in Reg. IX. of 1827, Sec. III., cl. 2.] It has already been held, in S. A. No. 350 of 1865, that a certificate of sale comes within the "judicial processes" mentioned in that clause.

Dhirajlál, in reply, contended that the term "process" meant some proceeding issuing out of the court, and which the court could enforce; that the certificate of sale, as its name imports, merely served to show that a sale had taken place, and that a certain person was the purchaser.

NEWTON, J. :—The only question which calls for a decision in this case is, whether the certificate of sale, being registered, should, on that ground, be preferred to, and satisfied before, the deed set up by the respondent, which is held proved by the Judge, but is not registered. Since the adjournment of this case, the point has been decided in the special appeal cited by the respondent's pleader, but we have considered the question independently of that ruling.

We cannot find any specific definition of the term "process" laid down in the Regulations of 1827. In Reg. III. of 1827, judicial processes are described as being *ordinary* and *extraordinary* (Secs. IX. and XI.); and under the head of ordinary process there is express mention made of orders and proclamations. The classes of documents there indicated appear indeed to include all those which ordinarily issue under the seal of the court and the signature of the Judge. And if the terms of the section (cl. 2, Sec. III., Reg. IX. of 1827) on which the decision of this case depends, be considered, it is similarly to be inferred that the term "process" has been used in a very comprehensive sense: for the judicial process there contemplated is of such a character as to affect the right or title to property; and decrees and awards are specified as examples. Within this language, such documents as the certificate of sale, now under consideration, appear to us to come; and under the terms "other judicial processes affecting the right or title to immoveable property"

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they follow in a very near relation to the decrees and awards there mentioned.

We are of opinion, therefore, that the certificate of sale relied on by the appellant, is not a document of such a character as to be entitled by law to any priority, by virtue of its being registered, over the unregistered lease set up by the respondent, and held established by the court below.

The decree must, therefore, be affirmed with costs.

Decree affirmed.

Special Appeal No. 57 of 1866.

B. G. GURA'VI .....*Appellant.*

V. L. GURA'VI and others .....*Respondent.*

Possession of land for thirty years—Reg. V. of 1827, Sec. 1.—Joint family—Separation—Fabrication of document.

In a suit brought to recover a share in land alleged to be joint family property, where the defendants pleaded possession as proprietors for more than thirty years :—

Held that it was not necessary that actual separation should be proved ; but that it was enough to show that the defendants had been in uninterrupted possession for more than thirty years.

1866. June 28. S. A. No. 57 of 1866.

THIS was a special appeal from the decision of W. H. Newnham, Acting Senior Assistant Judge of the Konkaṇ at Ratnágirí, in Appeal Suit No. 498 of 1864, reversing the decree of the Munsif of Málvaṇ, in Original Suit No. 2554 of 1861.

Bháná Govind Gurávi brought the suit against Viṭhoji Láḍoji Gurávi and four others, to recover possession of a fourth-share of a holding in Penḍor village, which he alleged to be joint family property.

The defendants answered that the plaintiff had no share in the land ; and that he had not, for a longer period than thirty years, held any portion of it as proprietor, although he had been in occupation as tenant within that period.

The Munsif found it proved that the plaintiff was a member of the family, and that as such he had been in possession within thirty years ; and passed a decree in his favour.

1866. June 28. S. A. No. 57 of 1866.

On appeal, the Senior Assistant Judge laid down the issues to be :—(1) Is plaintiff entitled to a share in the land; (2) If so, is his claim barred by limitation. His decision was as follows :—

"(1) The evidence on this head is, of course, directly conflicting. The Munsif has held the plaintiff's to be the true story; and on reading the evidence I am disposed to agree with him. I think it is shown that the plaintiff originally had a fourth-share in the family property.

"(2) But I cannot concur in the view that the claim is within the period of limitation. The defendants have been in possession for more than thirty years; but the Munsif has found occupation and recognition of the plaintiff's right proved within that time, by exhibits 39, 40, and 18 respectively. Now Nos. 39 and 40 show him certainly to have held certain of the fields; but apparently, as defendants say, merely on the footing of a tenant, as the same papers show several other men to have been holding: all are entered as tenants only; and this is not enough to keep his right alive.

"No. 18, again, is an agreement said to have been passed in 1832, by Láḍoji, father of one defendant, and uncle or brother of others, recognising the plaintiff's right, and stipulating that certain land should be held by Láḍoji for twenty-two years in default of redemption by the plaintiff. This document bears the signature of Láḍoji, which I find undoubtedly genuine, by comparison with other documents in the case. But the defendants point out that this signature and that of the witnesses are over the leaf at the top, and that the writing on the other (first) side is irregular; the latter lines being much wider apart than the first, so as to conclude the deed on the first page, and just fill it up. They suggest that the lower half of a paper with these signatures was cut away, just above the signatures; and then the deed written, so as to fill up the other side of the paper. After carefully examining the document, I have scarcely a doubt that this was the case. The trick is well known to every Mofussil court, and usually be-

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trays itself, owing to the great difficulty of getting all the writing in exactly and naturally on the other side of the paper. The defendants show, by a copy of another paper, that the two attesting witnesses to the document used about that time to attest kabuláyats for Láḍoji, and thus an old paper might have been procured for the purpose. It is true that a witness eighty years old deposes that such a paper was executed by Láḍoji, and that he attested it; and in 1855 the present plaintiff petitioned the Mámlatdár about the land, the twenty-two years having then expired, and then produced this document; but this only shows that, if forged, it was forged as long as ten years ago. Looking at the document, I cannot admit it as genuine; and after carefully examining the case, I cannot but come to the conclusion that the plaintiff, whose claim really was barred by limitation, has fabricated this deed No. 18, to take it out of the statute.

"The Munsif's decree is reversed, and the claim dismissed."

The case was heard before COUCH, C.J., and NEWTON, J.

Vishṇu Moreshvar and *Nánábhái Haridás* for the appellant:—The claim was not barred. The documents Nos. 39 and 40 have been misconstrued. The appellant claims a division of the joint property, several portions of which were managed by the different members without any specific division. The family not having been found to have been divided, it must be presumed to have remained in coparcenary; and the possession of the defendants was not adverse. The defendants held the land as trustees of the family.

Shántárám Náráyaṇ, for the respondents, cited S. A. No. 4268 (*a*); followed in S. A. No. 1028 of 1864 (*b*).

COUCH, C.J.;—In this case the Senior Assistant Judge held that the suit was barred by Reg. V. of 1827, Sec. 1. He has found that the defendants have been in possession for more than thirty years. The Munsif had found that the plaintiff had been in occupation within thirty years; and that he was, therefore, entitled to a share of the property.

(*a*) 7 Bom. S. D. A. Dec. 371. (*b*) Next case.

1866. June 28. S. A. No. 57 of 1866.

The Judge does not concur with him, and proceeds to examine the documentary evidence. He comes to the conclusion that exhibits Nos. 39 and 40 do not show the plaintiff's possession, and that exhibit No. 18 is a fabricated document.

The plaintiff did not put forward in the lower court the case now made for him, that the defendants were trustees for the family. The Judge found that the defendants had been in possession for thirty years; and, although he does not say so, he must have meant possession as proprietors. That being so, the claim is barred. The case cited by the respondent's vakíl is not so accurately expressed as we could have wished. The defendant was not bound to prove the negative that the plaintiff was not in possession; nor was it necessary that actual separation should be found. It was enough to show that the defendants had been in possession as proprietors for more than thirty years.

NEWTON, J., concurred.

Decree affirmed.

Special Appeal No. 1028 *of* 1864.

C. D. RA'NE and others.....*Appellants.*

G. R. RA'NE.....*Respondent.*

Hereditary allowance—Joint family—Reg. V. of 1827, *Sec.* I.

In a suit brought for a share in a hereditary family allowance, where the defendants pleaded possession for more than thirty years :—

Held that the lower appellate court was in error in holding that, "if a claimant is proved to be one of the *bháuband* of the defendants, no lapse of time, since the active enjoyment of the privileges, would bar his claim to such a share as he would be entitled to."

S. A. No. 4268, 7 Bom. S. D. A. Dec. 372, followed.

1865. February 20. S. A. No. 1028 of 1864.

THIS was a special appeal from the decision of A. T. Crawford, Senior Assistant Judge of the Konkaṇ, at Ratnágiri.

Govind bin Rághoji Ráv Ráne brought the suit, to establish his right, as a member of the Ráne family, to share in an hereditary allowance, called *páṭilki miráski*, in the village of Naringrái.

1865. February 20. S. A. No. 1023 of 1864.

The defendants denied the plaintiff's relationship; and pleaded that they, and those from whom they derived their right, had been in possession as proprietors for more than one hundred years.

The Munsif held the claim proved. But the Senior Assistant, on appeal, was of opinion that he was bound by a decision of the Bombay Ṣadr Adálat of the 15th of January 1853, in S. A. No. 2871, to hold that, "if a claimant is proved to be one of the *bháuband* of the defendants, no lapse of time, since the active enjoyment of the privileges, would bar his claim to such a share as he would be entitled to." And, finding the plaintiff to be a member of the family, he, accordingly, held that the claim was not barred.

Shántárám Náráyáṇ, for the appellant, relied upon S. A. No. 4268, decided on the 21st of December 1860.

PER CURIAM (COUCH, NEWTON, and WARDEN, JJ.):—The Senior Assistant Judge was in error in holding that the case referred to by him was binding upon him as a precedent; the contrary to that decision having been held by the late Ṣadr Court, in the much more recent case cited by the appellant's vakíl.

Following the decision in S. A. No. 4268 (*a*), the Court reverses the decree of the Senior Assistant Judge; and remands the case, in order that he may determine, whether or not the defendants have acquired a title, in the hereditary allowance claimed by the plaintiff, by possession without interruption as proprietors for a longer period than thirty years, under Reg. V. of 1827, Sec. I.

Case remanded.

(*a*) "The Court consider that, in a suit for a division of family property, if the party in possession can show thirty years of such possession uninterrupted and as proprietor, and further that, during this time, the party claiming has never derived any profit from, or recovered any part of the proceeds of, the property in dispute, then such possession is good proof of a separation of interests, and will bar the action."—*Per Keays, Hart, and Hebbert, Puisne Judges.* 7 Bom. S. D. A. Dec. 372.—ED.

Civil Petitions.

Ex parte KA'LIDA'S DA'MODHAR.
Ex parte BA'PUJI PITA'MBAR.

Execution of decrees—Limitation—Construction—Act XIV. of 1859, *Secs.* XX. *and* XXI.

Held that Sec. XX. (and not Sec. XXI.) of Act XIV. of 1859 applies to decrees or orders made after the 4th of May 1859; and that the words "in force at the time of the passing of this Act," must be construed to mean the time when the Act received the assent of the Governor General, namely, the 4th of May 1859, and not the 1st of January 1862, the time when (by Act XI. of 1861) it came into operation.

1866. December 12. Civil Petition.

THE petitioner, *Kálidás Dámodhar*, obtained a decree against Vithal Kúber on the 23rd of March 1860, shortly after which application was made to the court to enforce it; and, on the 8th of February 1861, a warrant was issued to arrest the defendant and bring him before the court; but, as he was not found, the warrant remained unexecuted. A second warrant to arrest was issued on the 27th of June 1864; but the defendant then also could not be found.

In June 1865, application for process of execution was again made to the Munsif, who rejected it, on the ground that it was barred by the law of limitation, and his order was confirmed, on appeal, by A. Bosanquet, Senior Assistant Judge at Kheḍá, on the 14th of January 1866.

Nánábhái Haridás, on the 14th of June 1866, obtained a *Rule Nisi:* calling upon the opposite party to show cause why those orders should not be reversed; and the Senior Assistant Judge was directed to report upon the petition, and forward the proceedings, and also to state why he did not record his reasons in English, as required by Sec. 184 of Act VIII. of 1859, and Sec. 38 of Act XXIII. of 1861.

The Ṣadr Amín in charge at Kheḍá, in his report, stated that "the late Senior Assistant Judge, Mr. Bosanquet, taking into consideration the provisions of Sec. XXI. of Act XIV. of 1859, and Act XI. of 1861, decided that decrees in force at the time Act XIV. of 1859 *came into operation*, whether partly executed or not, cannot be enforced after 1st

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January 1865;" and that "it was not the practice with Mr. Bosanquet to record his reasons in English in Miscellaneous Appeal cases."

The rule coming on for hearing this day, the opposite party did not appear.

THE petitioner, *Bápuji Pitámbar*, obtained a decree against Keshav Kásidás and two others, on the 22nd of August 1859; and applications for process of execution were made on the 22nd of September 1862, and on the 7th of March 1863.

On the 5th of August 1865, application was again made to the Munsif, who rejected it, on the ground that it was barred by the law of limitation; and his order was confirmed, on appeal, by A. Bosanquet, Senior Assistant Judge of Kheḍá.

Nánábhái Haridás obtained a *Rule Nisi*, in terms similar to those of the last case; and a similar report was returned by the Ṣadr Amín, in charge.

The rule coming on for hearing this day, the opposite parties did not appear.

COUCH, C.J.:—The Senior Assistant Judge in these cases has erred in construing the words "at the time of the passing of this Act" as equivalent to the time of its coming into operation.

It has been held in several cases by the High Court at Calcutta, and in more than one case by this court, that those words must be construed to mean the time when the Act received the assent of the Governor General of India, namely, the 4th of May 1859, and not the 1st of January 1862, the time when (by Act XI. of 1861) it came into operation.

Both these cases come under Sec. XX. (and not under Sec. XXI.) of Act XIV. of 1859, as both the decrees were made after the passing of that Act.

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We, therefore, reverse the decisions of the courts below, and remand the cases; in order that it may be ascertained, whether any proceedings had been taken to enforce these decrees or either of them, "or to keep the same in force within three years next preceding" the present applications for execution.

NEWTON and WARDEN, JJ., concurred.

Cases remanded.

Civil Petition.

BA'I U'DEKU'VAR.....*Applicant.*
MULJI NA'RAN .....*Opponent.*

Execution of decrees—Limitation—Construction—Act XIV. of 1859, *Secs.* XX. *and* XXI.

In the case of a decree, which was passed in 1831, and part payment made on the 2nd of February 1859, so that it was "in force at the time of the passing of" Act XIV. of 1859 (4th May 1859), the Sadr Amín rejected an application for execution made on the 19th of April 1865; but the District Judge reversed his order, being of opinion that decrees referred to in Sec. XXI. of the Act might be saved from the operation of Sec. XX., even though no process of execution had issued within the time provided for by Sec. XXI.:—

Held that the right construction of the Act was to keep these sections distinct, by applying Sec. XX. to decrees or orders made after the passing of the Act, and Sec. XXI. to decrees or orders in force at the time of its passing; and that it was not necessary to resort to Sec. XX. in construcing Sec. XXI., if the word "may" in the latter section were read as equivalent to *must* or *shall*, on the principle that affirmative words sometimes imply a negative of what is not affirmed, as strongly as if expressed.

Semble, where the issuing of the execution within the time limited by Sec. XXI. was prevented by the delay of the court which was to execute the decree, such court would have power to prevent an unjust prejudice to the suitor by the delay unavoidably arising from its own act, by ordering the execution to issue as of the date when it would have been issued if there had been no such delay.

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THE petitioner, Bái U'dekúvar, had been sued in the court of the Judge of Ahmedábád, by Gautamji Vaikutji and others, who obtained a decree against her, on the 15th of October 1831. This decree was purchased by Mulji Náran-dás, who, on the 19th of April 1865, applied for execution

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thereof to the Ṣadr Amín of Ahmedábád, by whom the application was rejected, as barred by the law of limitation.

On appeal, the District Judge, A. R. Grant, reversed the order of the Ṣadr Amín, recording the following decision :—

"This is an appeal from an order passed by the Ṣadr Amín of Ahmedábád, on an application for executing a judgment of prior date to the 1st of January 1862.

"The Ṣadr Amín was of opinion that no decree in force before that date can be executed after the 1st of January 1865, even if some proceedings shall have been taken to renew it within three years preceding the application for execution; and the ground on which he bases this opinion is that Sec. XXI. of Act XIV. of 1859, which refers to old decrees, specially enacts that nothing in the preceding section (in which an allusion is made to the revival of new decrees) shall apply to those in force before the Act *came into operation.* * * *

"Sec. XX. of Act XIV. of 1859 lays down, that what may be called the natural period of existence of decrees, is for the future to be three years only. This, however, would evidently have caused real injustice to the holders of old decrees, and we find that the next section goes on to enact that nothing in the preceding section shall apply to them (the old decrees); but that they may be executed, either within the time allowed by the former law, or within three years after the Act *had come into operation,* * which, by the limit being extended by Act XI. of 1861, is the 1st of January 1862.

"If the two sections are read together, it will be evident that Sec. XXI. is a necessary sequel to the preceding one, and that it must have been enacted with the express object of *protecting* the holders of old decrees. But the wording of the section is loose, and inasmuch as it merely says that nothing in the preceding section shall be applicable to old decrees, and as Sec. XX. adverts to the revival of (new) de-

* NOTE.—"At the time of *the passing of this Act*" are the words used in Sec. XXI.: *vide suprà*, p. 175.—ED.

crees, this leaves room for the objection to be raised that old decrees are not capable of being renewed.

"The primary object of Sec. xx., however, was to reduce the time allowed for the execution of decrees; and the reservation in favour of such as may be revived, though it was, of course, most necessary, is introduced merely in the way of an *exception* to the general rule laid down. I am, therefore, of opinion that we should interpret Sec. xxi. as meaning that the general rule laid down in the preceding section is not applicable to old decrees. * * * For these reasons, I am of opinion that decrees passed before the 1st of January 1862 may be executed even after the 1st of January 1865, if some proceedings shall have been taken to keep them in force within three years preceding the application for execution; and I, therefore, reverse the Ṣadr Amín's order with costs."

Dhirajlál Mathurádás, on the 14th of June 1866, obtained a *Rule Nisi:* calling upon the opponent to show cause why the decision of the District Judge should not be set aside as illegal, and the order of rejection by the Ṣadr Amín allowed to stand.

Reid and *Páṇdurang Balibhadra,* for the opponent, asked that the case might be remanded to the District Court for further inquiry, as to whether any process of execution had been issued within the time provided for by Sec. xxi. of Act XIV. of 1859, as that point had not been expressly determined by either of the courts below.

Couch, C.J.:—In this case, the decree was passed in 1831, and a payment made on the 2nd of February 1859 is indorsed on it. The decree was, therefore, in force at the time of the passing of Act XIV. of 1859.

Sec. xx. of that Act provides that: "No process of execution shall issue from any court not established by royal charter to enforce any judgment, decree, or order of such court, unless some proceeding shall have been taken to enforce such judgment, decree, or order, or to keep the same

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in force, within three years next preceding the application for such execution."

And by Sec. XXI.: "Nothing in the preceding section shall apply to any judgment, decree, or order in force at the time of the passing of this Act; but process of execution may be issued, either within the time now limited by law for issuing process of execution thereon, or within three years next after the passing of this Act, whichever shall first expire."

The rule for the construction of statutes is expressed by Mr. Justice Burton, in *Warburton* v. *Loveland* (*a*), in terms which have been approved of by eminent Judges in England: *Toldervy* v. *Colt* (*b*), *Edwards* v. *Hodges* (*c*); and many *dicta* to the same effect might be quoted from the judgments of the English courts. The same rule is followed in America: 1 Kent's Comm., 10th ed., 151. "I apprehend," says Mr. Justice Burton, "it is a rule in the construction of statutes that in the first instance the grammatical construction of the words is to be adhered to. If that is contrary to or inconsistent with any expressed intention, or any declared purpose of the statute, or if it would involve any absurdity, repugnance, or inconsistency in its different provisions, the grammatical sense must then be modified, extended, or abridged, so far as to avoid such an inconvenience, but no further."

Now it appears to me that to read Secs. XX. and XXI. together, and apply Sec. XX. to decrees in force at the time of the passing of the Act, would be a violation of this rule. Except in those sections, the Legislature has expressed no intention with regard to judgments, decrees, or orders, in force at the time of the passing of the Act, and the intention expressed is, that Sec. XX. is not to apply to them. The words in Sec. XXI. "nothing in the preceding section shall apply to" cannot be rejected; nor do I perceive any repugnance or inconsistency in keeping the sections distinct, and applying Sec. XX. to decrees or orders made after the passing

(*a*) 1 Hudson and Brooke 648. (*b*) 1 M. & W. 264.
(*c*) 15 C. B. 484.

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of the Act, and Sec. xxi. to decrees or orders in force at the time of its passing.

This Court cannot say that, if the holder of a new decree is obliged to take some proceeding to enforce it within three years, it is unreasonable that the holder of a decree when the Act passed should be required to have process of execution issued upon it within the same time, or within the period allowed by the old law.

If may be said that, if the words of Sec. xxi. are read literally, there will be no limitation whatever to decrees obtained prior to the passing of the Act. The answer to this appears to me to be that affirmative words in a statute do sometimes imply a negative of what is not affirmed, as strongly as if expressed; that "may" here means *must* or *shall*, and it is not necessary to resort to Sec. xx.

If may also be said that in this construction there will be this difficulty, that, unless the actual warrant of execution is issued within the period allowed by the old law, or within three years from the time of the passing of Act XIV. of 1859, no process of execution can be issued upon a decree obtained before the passing of the Act, however diligent the execution creditor may have been in endeavouring to obtain execution; and the probability of the issuing of the execution within the time limited being prevented by the delay of the court which is to execute the decree, appears in some of the cases in the Calcutta High Court to have had an influence in the decision. It would certainly be unjust that a creditor who has been diligent in endeavouring to obtain execution, and has done all that it is necessary for him to do to have execution issued, should be barred of his right by the delay of the court. But this inconvenience may be avoided by construing the words to mean that the creditor shall do all that is necessary to procure execution to be issued within the time limited.

Indeed it may be that in such a case a court would have power to prevent an unjust prejudice to the suitor by the delay unavoidably arising from its act, by ordering the

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execution to issue as of the date when it would have been issued if there had been no such delay: *Evans* v. *Rees* (*d*).

It, therefore, appears to me that we shall construe Act XIV. of 1859 in accordance with the expressed intention of the Legislature, by holding that, in the case of a judgment, decree, or order, in force at the time of its passing, the creditor must, within the time limited, do all that is necessary to procure process of execution to be issued, and that if he fails to do so, the decree cannot be enforced.

It has not been shown that this was done in the present case, but it is contended that possibly process of execution might have been issued, and we are asked to remand the case for further inquiry on that point; but the bare possibility is not a sufficient ground for our doing so. If anything of the kind had occurred, it is not likely that it would not have appeared in the proceedings and before the Judge.

The order of the Judge (who, I may observe, is also in error as to the time from which the three years are to be calculated) must be reversed, and the order of rejection by the Sadr Amín will stand.

NEWTON AND WARDEN, JJ., concurred.

(*d*) 12 A. and E. 167.

Rule absolute.

CROWN CASES

DECIDED IN THE

ORIGINAL AND APPELLATE JURISDICTIONS

OF THE

HIGH COURT OF BOMBAY.

REG. *v.* BHA'SKAR K. KHA'RKAR.

Penal recognizance to keep the peace—Irregular order by Magistrate—Appeal—Reference—Crim. Proc. Code, Secs. 280, 295, 296, 409, 429, *and* 434.

There is no appeal to the Court of Session from an order made by a Magistrate, under Sec. 409 of the Crim. Proc. Code, requiring a penal recognizance to keep the peace under Sec. 280.

The Court of Session may, however, in such case, under Sec. 434 of the Code, call for and examine the record of the Court below; and, if it shall be of opinion that the order of the Magistrate is contrary to law, refer the proceedings for the orders of the High Court.

There is no provision of the Crim. Proc. Code which makes it lawful for a Court of Session to call for and examine the record of a case tried by a Sub-Magistrate, where no sentence or order has been passed thereon by the *immediately* subordinate Court of the Magistrate.

A conviction of house-trespass by a subordinate Magistrate was reversed, on appeal, by the Magistrate of the District, who, moreover, directed the subordinate Magistrate to take a recognizance bond in the sum of Rs. 50 from the accused, that he would not, for one year, enter the house, and would not commit a breach of the peace:—

Held by the High Court that the order directing the recognizance bond to be taken should be set aside, as having been improperly made by the Magistrate in the absence of the accused, and upon the suggestion of his adversary.

Semble the order was also illegal, as not authorized by Sec. 280, or any other section of the Code of Criminal Procedure.

1866. March 20. Referred Case.

THE record and proceedings in this case were referred for the orders of the Court, under Sec. 434 of the Criminal Procedure Code, by R. H. Pinhey, Session Judge of the Konkan, by whom the following judgment, in which the facts are fully stated, was recorded:—

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"This is a petition against an order of E. P. Down, the Acting District Magistrate of Thánă, dated the 11th of August 1865, whereby the petitioner was required to furnish recognizance, in the sum of Rs. 50, that he would not enter a house, or make a disturbance therein. for the space of one year.

"The consideration of the petition was postponed from time to time, at the request of the petitioner, to enable him to entertain a pleader, on the ground that he had not yet been able to secure the assistance of any pleader in this court, in consequence of his adversary being his brother, Mádhavrávr Krishna Kharkar, a pleader in the High Court at Bombay and also in this Court. At last the petitioner having secured the assistance of a pleader, the petition was heard and argued on Wednesday, the 3rd of January 1866, and judgment was postponed.

"*Firstly.*—The petitioner appeals against the order of the Magistrate, under Sec. 409 of the Code of Criminal Procedure; and prays that so much of that order as requires him to furnish security may be reversed.

"*Secondly.*—The petitioner prays the Court of Session to refer the Magistrate's proceedings to the High Court, under the provisions of Sec. 434 of the Code, together with the opinion of the Court, that the Magistrate's proceedings were irregular, and his order contrary to law.

"I. I reject the appeal of the petitioner; because I am of opinion that no appeal will lie to the Court of Session, under Sec. 409 of the Code of Criminal Procedure, from the order of the Magistrate complained against. By Sec. 409 an appeal may be preferred to the Court of Session by a person (1) who has been convicted on a trial held by the Magistrate of the District, or by a F. P. Magistrate; or (2) who has been required by such Magistrate, under Sec. 295 or Sec. 296 of the Code of Criminal Procedure, to give security for good behaviour. The petitioner in this case was not convicted by the Magistrate of the District; nor was he required by such Magistrate to give security for good behaviour under

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Sec. 295 or Sec. 296. The section of the Code under which the petitioner was required (not to give security, as is erroneously stated at the bar of the Court, but) to give a penal recognizance to keep the peace, is not cited in the Magistrate's order; but it is apparent on the face of the order that the order to give a penal recognizance, whether right or wrong, was made under Sec. 280. From this order there is no appeal to the Court of Session.

"II. I am of opinion, however, that the petitioner has shown such irregularity in the Magistrate's procedure, and such illegality in the Magistrate's order, as require that I should refer the case for the orders of the High Court, under Sec. 434 of the Code of Criminal Procedure.

"In order to the more clear understanding of the reasons on which my opinion is based, I must state, briefly, the nature of the proceedings that preceded the Magistrate's order, as well as the exact form in which that order is drawn out.

"The two brothers, Mádhavráv and the petitioner Bhás-karáv, occupied one house up to some time in March last. The elder brother, Mádhavráv, says that the house is his own sole property; and that he allowed his younger brother to live with him, because he was his brother. About March last the brothers quarrelled, and the elder, Mádhavráv, turned the petitioner out of the house. After this both brothers complained to the First Class Sub-Magistrate at Tháná, Ráv Báhádúr Náráyan Rávjí. Mádhavráv complained against the petitioner for having committed house trespass, an offence punishable under Sec. 448; and the petitioner complained against Mádhavráv for having committed wrongful restraint, an offence punishable under Sec. 341 of the Penal Code. The complaint of the petitioner against Mádhavráv was dismissed; but the petitioner was convicted of house trespass, and sentenced to pay a fine of Rs. 2. The petitioner appealed to the Magistrate of the District, who reversed the conviction and sentence recorded by the First Class Sub-Magistrate; and proceeded to pass the order, to which the petitioner objects.

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"Before stating the precise nature of this order, I must notice that, although the proceedings held on the complaint of Mádhavráv are before the Court, I have been obliged to take the statement of the petitioner's pleader regarding the proceedings instituted by his client (a statement the correctness of which is not impugned by the Government prosecutor, who appears to support the Magistrate's order), because from an order of the Magistrate presented to this Court it appears that the Magistrate refused to give the petitioner copies of his case; and the law does not allow the Court of Session to call for the record and proceedings in a case tried by a Sub-Magistrate.

"I now proceed to quote the Magistrate's order *verbatim* —first noticing that the order is preceded by the single word रद्द (cancelled) in pencil.

[Here follows copy of the order in Maráthí.]

"The literal translation of which is as follows :—

"'Ordered—The conviction is reversed. The amount of the fine is to be repaid and an answer written to petitioner.

"'To Ráv Báhádúr, First Class Sub-Magistrate of the Sáshtí Talúká. After recording the papers, make a report. 11 August 1865.

"'*Postscript.*—Restore the amount of the fine. The same date. *Postscript.*— Take a recognizance bond in the sum of Rs. 50 from the accused, that he will not, for one year, enter the house and will not commit a breach of the peace. The same date.

(Signed) E. P. Down.'

"The objections taken to the Magistrate's order by the petitioner's pleader are :—(1) As petitioner was not convicted before the Magistrate, and no such recommendation was made by the Sub-Magistrate, the order to give a recognizance was not according to the provisions of Sec. 280 of the Code of Criminal Procedure. (2) As the order of the Magistrate, and his reasons for making it, were not written by the Magistrate in English, but by the Magistrate's kárkún in Maráthí alone, the order is illegal under Sec. 429 of the Code. (3) As the house in which the petitioner and his brother

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lived was their joint property, and the Magistrate upset the Sub-Magistrate's conviction; the Magistrate was not competent to call on the petitioner to give a recognizance. (4) The order of the Magistrate on appeal was worse than the order appealed against. (5) The Magistrate's order was added to in the absence of the petitioner, and after the final order, as it originally stood, had been made known to the petitioner. (6) The words 'not to enter the house' are beyond the Magistrate's competence, and as both the brothers were complainants, the Magistrate should have taken recognizance from both, if from either.

"The first objection taken by the petitioner's pleader appears to me a good one. By Sec. 280 of the Code of Criminal Procedure, when a person is convicted, before a Court of Session, or a District Magistrate, or a F. P. Magistrate, of rioting, assault, or other breach of the peace, or with abetting the same, or with assembling armed men, or taking other unlawful measures with the evident intention of committing the same, such Court or Magistrate may then require a penal recognizance, for keeping the peace, from the person so convicted; and by the latter part of the same section, when a person is convicted of any such offence before a Sub-Magistrate, the Magistrate of the District may, on the report of the Sub-Magistrate, require such recognizance to be given. In the present case the petitioner was neither charged with, nor convicted of, any of the offences mentioned in Sec. 280; the petitioner was not convicted before the Court of Session, or a F. P. Magistrate; the Sub-Magistrate, before whom the petitioner was convicted, did not recommend the Magistrate to order that a penal recognizance should be taken from him; and the conviction, recorded against the petitioner, was reversed by the Magistrate, on appeal. I am of opinion, therefore, on the first ground urged by the petitioner's pleader, that the orders of the High Court must be solicited.

"The second objection, that the Magistrate's order is illegal, because neither it, nor the reasons for making it, are written in the English language as required by Sec. 429 of

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the Code of Criminal Procedure, is also, in my opinion, a good objection; but it is not one which I should have felt called on to report for the orders of the High Court, as it is not one affecting the merits of the case. The third objection is also a good one. It is in fact included in the first.

"The fourth objection requires no comment. The Magistrate did not on appeal enhance the sentence of the lower court; but he reversed the conviction, and passed an order, which I think was in itself illegal. It is of course in a certain sense true, that the petitioner was better off before his appeal than after it resulted in his favour; for it were better for him to pay Rs. 2 fine, than to bind himself not to enter his house for a year. But this consideration is not one of which I need take further notice in disposing of the present petition.

"The fifth objection is rather a remarkable one, when taken in consideration with the wording of the Magistrate's order, and the pencil note above it. The allegation of the petitioner's pleader is, that, when his appeal was tried by the Magistrate, the only order given was one simply reversing the conviction recorded by the Sub-Magistrate; and that the order to which the petitioner objects was made, afterwards, by the Magistrate, in the absence of the petitioner. There are *primâ facie* grounds for believing this assertion to be true, because the word written in pencil would appear to represent the order received by the kárkún from the Magistrate at the time the appeal was disposed of; while that part of the order to which petitioner objects is not contained in the copy of the Magistrate's order given by the Magistrate to the petitioner filed in this court, and is in fact tacked on to the Magistrate's original order in the shape of a second *postscript*. I do not, however, see any necessity for my inquiring further, and certainly when and under what circumstances the second *postscript* was written, as I am of opinion that the order therein contained is itself illegal.

"The sixth objection is also in my opinion a good one. Supposing, for argument's sake, that, although after the Magistrate reversed the conviction recorded by the Sub-

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Magistrate, he was competent to require a penal recognizance from the petitioner for keeping the peace, under the provisions of Sec. 280 of the Code, I am of opinion that the words in the Magistrate's order which required the petitioner *not to enter the house* were *ultra vires*.

"For the reasons given above I refer all the proceedings now before the Court of Sessions for the orders of H. M.'s High Court of Judicature at Bombay, under the provisions of Sec. 434 of the Code of Criminal Procedure."

The case came on for final disposal this day before SAUSSE, C.J., and TUCKER, J.

PER CURIAM :—The Court set aside so much of the order made by the Acting Magistrate of the District on the 11th of August 1865 as directs the First Class Subordinate Magistrate to take a recognizance bond in the sum of Rs. 50 from Bhâskar Krishṇa, that he would not for one year enter the house in the proceedings mentioned, and would not commit a breach of the peace; such order having been improperly made, upon the application of one party, and in the absence of the other party.

The Registrar is directed to inform the Magistrate that the Chief Justice and Judges desire to call his serious attention to the very great neglect of duty which has been exhibited by him in these proceedings, in making an order against one party in the absence of that party, and upon the suggestion of his opponent. Such conduct strikes at the very root of the administration of justice; and the Chief Justice and Judges hope that no similar instance of dereliction of duty on the part of this Magistrate may come under their observation, as in that case they will feel bound to bring the conduct of the Magistrate to the special notice of the Government of Bombay.

The Chief Justice and Judges also desire to call the Magistrate's attention to Sec. 429 of the Code of Criminal Procedure, and to his omission to comply with its provisions.

Order set aside.

REG. *v.* A'TMA'RA'M WA'MAN BHA'NDA'RKAR.

Indian Post Office Act (No. XVII.) of 1854—Jurisdiction.

On a reference by a Session Judge in reviewing the monthly magisterial returns:—*Held* that a conviction and sentence recorded by a Magistrate, F. P., under Sec. 50 of the Post Office Act, No. XVII. of 1854 (corresponding with Sec. 48 of the Act of 1866), were illegal; as the Magistrate had no jurisdiction finally to dispose of the case, but was bound to have committed it for trial before the Court of Session.

1866. June 13. Referred Case.

THE prisoner was convicted, in the month of February 1866, by Rámchandrá Amrit Dugal, Magistrate, F. P., in the Ratnágiri District, under Sec. 50 of the Indian Post Office Act (No. XVII.) of 1854 (*a*), of the offence of opening a banghy parcel, and fraudulently appropriating the contents thereof, and sentenced to suffer 24 hours' simple imprisonment, and to pay a fine of Rs. 45, or, in default, to suffer rigorous imprisonment for three months.

The record and proceedings were forwarded to the High Court on the 23rd of May by R. H. Pinhey, Session Judge of the Konkan, with the following remarks:—

"The record and proceedings in this case were sent for because, on reviewing the monthly magisterial return, it appeared to me that the sentence passed was wholly inadequate to the serious offence of which the accused had been convicted. A perusal of the record and proceedings confirms the opinion that I arrived at from the monthly return.

"But on reviewing the case it appears to me that the F. P. Magistrate who tried it was not competent finally to dispose of it; but was bound to have committed it for trial before the Court of Session.

(*a*). The corresponding section of the Indian Post Office Act, 1866, is as follows:—"Sec. 48. Whoever being in the employ of the Government in the Post Office Department, shall steal, fraudulently appropriate, or wilfully secrete, destroy, or throw away any letter or other article sent by post, or anything contained in any such letter or other article, or shall mutilate or break open any such letter or other article, or any mail bag or box, with the intention of fraudulently appropriating anything therein contained, shall be punished, on conviction before a Criminal Court, with imprisonment of either description as defined in the Indian Penal Code for a term not exceeding seven years and shall also be liable to fine."—ED.

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June 13
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"By the (now repealed) Act XVII. of 1854 the offences specified in Secs. 4, 15, 16, 24, 32, 33, 36, 40, 41, 43, 47, 51, and 53 are punishable with fine only. The meaning of the word fine is given in Sec. 66 of the Act. By Sec. 58 of the Act all offences punishable under the Act with fine only are triable by a Magistrate (*i. e.*, District Magistrate) or any person lawfully exercising the powers of a Magistrate (*i. e.*, a Magistrate, F. P., as they are now called) (*b*).

"The offences specified in Secs. 35, 50, 52, 54, 55, 56, and 57 of Act XVII. of 1854 are by those sections punishable with imprisonment, to which a fine may be added; and the offences specified in Secs. 34 and 65 are punishable with imprisonment or fine. Now all these offences, except those specified in Secs. 34, 35, and 50, are declared in the sections defining the offence to be punishable on conviction before a Magistrate. But no jurisdiction is given to Magistrates to convict persons of the offences specified in Secs. 34, 35, and 50; and the reason of this is apparent, at least as respects offences punishable under Secs. 35 and 50: for these are very grave offences, punishable with seven years' imprisonment, to which a fine may be added.

"I am, therefore, of opinion that the conviction and sentence, recorded by the F. P. Magistrate in this case under Sec. 50 of Act XVII. of 1854, are illegal; the F. P. Magistrate not having jurisdiction to convict and sentence under the said section.

"As this case is not before the Court of Session on appeal, I am of opinion that I am not competent to deal with the case, under Sec. 427 of the Code of Criminal Procedure; because I am not sitting in this case as an Appellate Court, but as a Court of review under Sec. 434 of the Code. Therefore it appears to me that I should refer the case, under Sec. 434 of the Code, for the orders of Her Majesty's High Court of Judicature at Bombay; as that court has full

(*b*) The corresponding section of the Ind. P. O. Act, 1866, is as follows:—"Sec. 53. Any person, whether a European British subject or not, who shall be guilty of any offence for which, according to the provisions of this Act, he shall be liable to a fine only, shall be punishable for such offence by any Criminal Court upon a summary conviction."

1866. June 13. Referred Case.

power, under Sec. 404, to order that the case be committed for trial before the Court of Session, or to make any other order that to the said Court may seem right."

The case came on for hearing this day before COUCH, C. J., and NEWTON, J.

PER CURIAM :—The Court annuls the conviction and sentence, as the Magistrate, F. P., had no jurisdiction to convict of an offence punishable under Sec. 50 of Act XVII. of 1854.

REG. *v.* LAKSHMAN BA'LA'JI'.

Indian Railway Act (No. XVIII.) of 1854—*Jurisdiction.*

Held that a conviction by a Magistrate, F. P., under Sec. 26 of the Railway Act, was illegal for want of jurisdiction.

1866. June 13. Referred Case.

THE prisoner was convicted in the month of March 1866 by Lieutenant H. E. Reeves, Magistrate, F. P., in the Thánà District, under Sec. 26 of the Railway Act (No. XVIII.) of 1854, of the offence of wilfully omitting to do what he was legally bound to do; and sentenced to suffer two months' rigorous imprisonment, and to pay a fine of Rs. 50, or, in default, to suffer one month's further rigorous imprisonment.

The record and proceedings were forwarded to the High Court on the 23rd of May by R. H. Pinhey, Session Judge of the Konkan, under Sec. 434 of the Criminal Procedure Code, with the following remarks :—

"The record and proceedings in this case were called for on a review of the Magistrate's monthly return. The conviction and sentence appear to me to be illegal.

"By Sec. 30 of the Railway Act (No. XVIII.) of 1854 all offences punishable with fine only are punishable by a Magistrate (*i. e.*, District Magistrate) or person lawfully exercising the powers of a Magistrate (*i. e.*, a Magistrate with F. P.).

"The offences defined in the latter part of Sec. 27 and in Sec. 28 of the Railway Act are punishable with imprison-

ment or fine; and they are also by the terms of these sections punishable by a Magistrate.

1866. June 13. Referred Case.

"But a Magistrate is nowhere given final jurisdiction over an offence punishable under Secs. 25 and 26 of the Railway Act; and, therefore, I am of opinion that the conviction and sentence recorded by the F. P. Magistrate in this case are illegal."

The case came on for hearing this day before COUCH, C.J., and NEWTON, J.

PER CURIAM:—The Court annuls the conviction and sentence, as the Magistrate, F. P., had no jurisdiction to convict of an offence punishable under Sec. 26 of Act XVIII. of 1854.

REG. *v.* PRABHA'KAR N. SOMAN.

Bombay Ferries' Act, No. XXXV. of 1850—"*Magistrate of the zilla*" —*Reg. XII. of* 1827—*Jurisdiction.*

A conviction by a Full Power Magistrate under Sec. 9 of the Bombay Ferries' Act, annulled for want of jurisdiction; as the "Magistrate of the zillah" alone was empowered by Sec. 16 summarily to hear and determine all offences against the Act.

1866. July 11. Referred Case.

THIS case was referred for the orders of the Court, under Sec. 434 of the Code of Criminal Procedure, by R. H. Pinhey, Session Judge of the Konkan, with the following remarks:—

"The accused is reported as having been charged with having crossed at a public ferry and, 'with intent of avoiding payment, fraudulently passed through the toll-station without paying the toll;' and sentenced by Mr. John Elphinstone, Magistrate F. P. in the Thána District, to pay a penalty of Rs. 20, under Sec. 9 of Act XXXV. of 1850.

"I am of opinion that the conviction and sentence are illegal: as, by Sec. 17, all offences against the 'Act shall be summarily heard and determined by the Magistrate of the zillah, within the limits of which the same shall have been committed;' and, therefore, the F. P. Magistrate had no jurisdiction to try the case.

1866. July 11. Referred Case.

"The denomination of 'Zillah Magistrate' appears from Sec. I. and Sec. III. Cl. 1 of Reg. XII. of 1827 to apply only to the 'Collector of each Zillah.' It is true that those sections have been partially repealed [so far as they provide for the punishment of offences] by Act XVII. of 1862; but that does not, I think, affect the meaning to be put on the term 'Magistrate of the Zillah' in Sec. 16 of the Bombay Ferries' Act."

The case came on for hearing this day before COUCH, C.J., NEWTON and WARDEN, JJ.

PER CURIAM:—The Court annuls the conviction and sentence, and order the fine to be returned if paid: and the Magistrate of the district has authority to entertain any complaint which may be preferred to him against the accused.

Conviction and sentence annulled.

REG. *v.* JÍVAN USMA'N and others.

Bombay Cotton Frauds' Act, No. IX. of* 1863—*Jurisdiction.

Convictions under Sec. 2 of the Act, and sentences of one month's rigorous imprisonment, as well as an order for confiscation of cotton, set aside for want of evidence to show that the Deputy Magistrate who tried the case had jurisdiction in the matter over the persons convicted; and for want of evidence of fraud.

As to whether, notwithstanding Sec. 411 of the Criminal Procedure Code, a regular appeal lies in such case—*Quære.*

1866. July 5. Crim. Review.

THE record and proceedings in this case had been called for, under Sec. 404 of the Code of Criminal Procedure.

Purushottam Nathu, Dharamdás Girdhar and Jívan Usmán were charged before Kuvarjí Kávasjí, Deputy Magistrate of Broach, with "fraudulently mixing cotton of different varieties in one bale," an offence punishable under Sec. 2 of Bombay Act, No. IX. of 1863.

Nine bales of mixed cotton were found in the possession of accused No. 1 at Broach; and, as he stated, had been sent to him for the purpose of being sold by accused Nos. 2

and 3 (who resided within the territories of H. H. the Gáikavád).

1866. July 5. Crim. Review.

The Deputy Magistrate recorded the following finding:—

"It is proved from the evidence of witness No. 2, and of some of the witnesses for the defence, that the cotton in the bales in question is of two different varieties. It is clear, from what the accused Nos. 2 and 3 state, that they did not care as to whether the cotton was of one description or of different varieties; since it was purchased by them, in very small quantities, at different times, and from different persons.

"Under these circumstances the Court finds that Dharamdás Girdhar and Jívan Usmán are guilty of fraudulently mixing cotton of different varieties in nine bales of cotton, and that they have thereby committed an offence punishable under Act IX. of 1863, Sec. 2. And the Court directs that the said Dharamdás Girdhar and Jívan Usmán be rigorously imprisoned each for a period of one month. The nine bales of cotton in question are ordered to be confiscated. Purushottam Nathu is acquitted and discharged."

From this conviction an appeal was preferred to the Session Judge at Súrat, who dismissed it for want of jurisdiction, under Sec. 411 (*a*) of the Code of Criminal Procedure.

The case came on for final disposal this day before COUCH, C.J., NEWTON and WARDEN, JJ.

Shántárám Nárayan for the petitioner:—There is no evidence of fraudulent mixing; and if the cotton was mixed by the petitioners, the presumption is that the mixing took place within the territories of the Gáikavád, in which case the Deputy Magistrate could have no jurisdiction under the Act.

There was also error in law in the decision of the Court of Session; inasmuch as an appeal lay to it from the sentence of the Deputy Magistrate, which was not merely one "of

(*a*) Sec. 411.—"In all cases in which a Court of Session or the Magistrate of a District or other officer exercising the powers of a Magistrate shall pass a sentence of imprisonment not exceeding one month, or of a fine not exceeding fifty rupees, no appeal shall be allowed."

1866. July 5. Crim. Review.

imprisonment not exceeding one month;" but, also, one of confiscation of property.

[COUCH, C.J.:—It must be shown that the confiscation was a part of the sentence. It follows the sentence under Sec. 2, but does not accompany it. Under Sec. 3, fraudulently selling or offering for sale adulterated or deteriorated cotton is an offence punishable with imprisonment, or fine, or both; and in that case, also, the cotton is confiscated, though it may not be the property of the person who sells or offers it for sale.]

Dhirajlál Mathurádás, in support of the conviction, referred to the examinations of the accused before the Magistrate.

COUCH, C.J.:—The conviction under Sec. 2 of the Cotton Frauds' Act cannot be supported. There is no evidence that the petitioners committed any offence within the jurisdiction of the Deputy Magistrate; or, in fact, that they fraudulently or dishonestly mixed bad with good cotton.

It is not necessary for us to determine the question of the right of appeal, against such a sentence, to the Court of Session; because it would be useless to send the case to the lower Appellate Court, after our finding of the absence of evidence of an offence and of the want of jurisdiction.

Conviction, sentence, and order for confiscation annulled.

NOTE.—The following sections of the Act are material:—

Sec. II.—Whoever adulterates or deteriorates cotton by mixing therewith any seed, dirt, stones, or other foreign matter, or who fraudulently or dishonestly mixes cleaned and uncleaned cotton, commonly called cuppas, or cotton of different varieties in one bale, or who fraudulently or dishonestly, by exposing cotton to dew or by any other means, deceptively increases or attempts to increase the weight of the same, shall be punishable on conviction with imprisonment of either description for a term not exceeding twelve months, and shall also be liable to fine. All cotton so adulterated, or deteriorated, or fraudulently mixed, or deceptively increased in weight, and which has formed the subject of such a conviction, shall be confiscated.

Sec. III.—Whoever fraudulently or dishonestly sells, or offers for sale, any cotton adulterated, deteriorated, or deceptively increased in weight, as in the 2nd Section of this Act described, shall be punishable on conviction, with imprisonment of either description for a term not exceeding twelve months, or with fine, or with both. All such cotton so sold or so offered for sale and which has formed the subject of such a conviction shall be confiscated.

REG. *v.* SHANKAR VENKA'JI' and another.

Crim. Proc. Code, Sec. 411—*Appeal.*

Held **that no appeal lies where the sentence of imprisonment and of further imprisonment in default of payment of a fine does not, in the aggregate, exceed the term of one month.**

1866. December 19.

THIS was an application under Sec. 404 of the Code. The prisoners were convicted of rioting by a Magistrate F. P. in the Dhárwár District; and sentenced each to suffer simple imprisonment for a period of fifteen days, and to pay a fine of Rs. 25, or in default to suffer imprisonment for a further period of fifteen days.

The Session Judge held that, under Sec. 411 of the Code of Criminal Procedure, an appeal would not lie.

Ganpatráv Bháskar, for the prisoner, referred to a decision of the Agra Ṣádr Court (1st September 1863) cited in Prinsep's edition of the Code of Criminal Procedure, in which it was laid down that "If a sentence of imprisonment *and* fine be passed, although both sentences be within the limits specified in Sec. 411, there will be an appeal; but the fact that imprisonment is awarded in default of payment of fine will not alone give a right of appeal."

COUCH, C.J.:—Sec. 411 cannot be construed to mean that an appeal lies in all cases in which a combined sentence of fine and imprisonment is passed: for it is absurd to suppose it was intended that an appeal should lie when a prisoner was sentenced to suffer imprisonment for one day, and to pay a fine of one rupee, but not where he was sentenced to suffer imprisonment for twenty-nine days.

In the particular case of the Agra Court cited it may be that the imprisonment would in the aggregate have amounted to more than a month; but in the present case it could not exceed that term, and, therefore, I am of opinion that no appeal lies.

NEWTON and WARDEN concurred.

Petition rejected.

REG. *v.* NAVALMAL VALAD UMEDMAL.

Ind. Pen. Code, Sec. 211—False charge.

Where a person is charged, under Sec. 211 of the Penal Code, with having, with intent to injure, falsely charged another with an offence, knowing that there is no just and lawful ground for the same, the party accused should be allowed to show the information on which he acted; and the Judge ought not only to be satisfied that the facts alleged as the ground for making the charge, are in themselves untrue and insufficient, but also that they were known to be such to the accused when the charge was made by him.

1866. June 20. Crim. Appeal.

THE prisoner, on the 27th of March 1866, was convicted by S. H. Phillpotts, Assistant Session Judge of Ahmednagar, of having, with intent to cause injury to one Viloráv Parbatráv Pátíl, charged him with an offence punishable with death, namely murder, well knowing that there was no just or lawful ground for such a charge; and was sentenced to suffer rigorous imprisonment for one year.

Against this conviction and sentence the prisoner petitioned the High Court, stating the facts of the case as follows:—His father, who was old and infirm, was found dead in the garden of the Police Pátíl of Párner on the 28th of February; and as he did not then suspect any person of having caused his death, he petitioned the Pátíl to be allowed to burn the body. Permission was not granted; and, on the 2nd of March, the prisoner presented a petition to the Fouzdár, stating that he suspected the Pátíl of having killed his father, and that on examining the body a wound was found on the neck. The information, upon which the second petition was presented, was obtained by him subsequent to his first petition to burn the body; and two witnesses were called by him on his trial, who stated that they had seen the Pátíl assault the deceased. The verdict returned upon the inquest was, that "the deceased died of injuries received from a fall, in consequence of his having been pushed."

1866.
June 20.
Crim. Appeal.

The appeal was heard this day before COUCH, C. J., and NEWTON, J.

Reid and *Dhirájlál Mathurádás* for the prisoner.

COUCH, C. J.—The prisoner is charged with the offence of falsely charging a person with having committed an offence, knowing that there was no just or lawful ground for such charge. Whether there was a ground or not must depend on whether or not he was told what he says he was. It is possible that the witnesses Nos. 11 and 12 may not have seen what they told the prisoner they had seen; yet, if they told him, he would have ground for taking proceedings against the Pátíl. The witnesses Nos. 11 and 12 are not persons likely to come forward and make a false charge against a man in authority like the Police Pátíl. The prisoner may have believed what they told him. The Assistant Judge says that he disbelieves the witnesses. He does not say whether he disbelieves them wholly, or whether he disbelieves that they gave the alleged information to the accused. The Judge says that the coincidence is a little too extraordinary: it would not be extraordinary if they had arranged to throw suspicion on the Pátíl. This circumstance and the demeanor of the witnesses led the lower court to treat them as perjured witnesses. There is no doubt that the lower court has the advantage of being able to form an opinion as to the credibility of witnesses from their demeanor, and the absence of that test is a disadvantage under which this court must labour; but the weight to be attached to such an opinion must depend upon the experience of the Judge who tried the case. And in the present case we cannot satisfactorily come to the conclusion that the evidence adduced by the prisoner was to his knowledge untrue, when he put it forward; or that he was not justified in asking for an inquiry regarding the cause of his father's death.

We think, therefore, that the prisoner was not rightly convicted.

Conviction and sentence reversed.

REG. *v.* BHA'ISHANKAR HARIRA'M.

"Magistrate of the District"—Appeal—Crim. Proc. Code, Secs. 14 *and* 412—*Proclamation by Government.*

Government may by proclamation declare and direct that an Assistant Collector in charge of the Collectorate, during the absence of the Collector, shall be, during that period, "the chief officer charged with the executive administration of the District in Criminal matters;" and such officer being, within the meaning of Sec. 14 of the Crim. Proc. Code, "the Magistrate of the District," may hear appeals from Subordinate Magistrates, under Sec. 412 of the Code.

1866. November 14. THIS was a petition under Sec. 404 of the Code of Criminal Procedure.

The prisoner was convicted, by the Subordinate Magistrate of Ankleshvar, under Sec. 406 of the Penal Code, of criminal breach of trust, and sentenced to suffer four months' rigorous imprisonment and to pay a fine of Rs. 200.

Against this conviction an appeal was presented to the Magistrate of the District, which was heard by an Assistant Collector "in charge of the Collectorate" of Súrat, who rejected the appeal.

Shántárám Náráyaṇ for the petitioner.

Dhirajlál Mathurádás, Government Pleader, in support of the conviction.

COUCH, C. J.—In this case there was evidence before the Magistrate that the prisoner was guilty of criminal breach of trust; and consequently the only question now to be decided is, whether the Magistrate in charge of the District had jurisdiction to hear the appeal.

Sec. 412 of the Criminal Procedure Code enacts that "Any person convicted on a trial held by an officer exercising powers less than those of a Magistrate, may appeal to the Magistrate of the District, or other officer exercising the powers of a Magistrate, who shall have been empowered by the Government to hear such appeal." And by Sec. 14—"the words 'Magistrate of the District' shall mean the chief officer charged with the executive administration of a

District in Criminal matters by whatever designation such officer is called." 1866. November 14.

On the 21st of May 1863 the following Notification, dated the 20th of May, was published in the *Bombay Government Gazette*:—"With reference to Sec. 14 of Act XXV. of 1861, His Excellency the Governor in Council is pleased to declare and direct that an Assistant Collector in charge of the Collectorate is and shall be, during that time, the chief officer charged with the executive administration of the District in Criminal matters."

The Collector and Magistrate of Súrat, Mr. Duff, at the time the appeal was preferred, had left, and Mr. Hogg was in charge of the Collectorate, and was, therefore, by virtue of the proclamation, "the chief officer charged with the executive administration of the District in Criminal matters," and within the meaning of the words "Magistrate of the District."

There seems no reason why (as has been here contended) Government should in every case *specially* empower a Magistrate, not being the Magistrate of the District, to hear appeals under Sec. 412 of the Code; and why it should not be done once for all by proclamation. Public convenience is in favor of this procedure in order that the course of justice may not be impeded, and that convicts may not be sometimes practically denied the right of appeal given them under Sec. 412, by the delay which would be occasioned in obtaining the special sanction of Government in the case of every officer left in charge of the duties of Magistrate of the district.

NEWTON and WARDEN, JJ., concurred.

Petition rejected.

REG.

v.

DAYA'L JA'IRA'J, KHATA'O LADHA' and KALLIA'NJI' LADHA'.

Separation of Jury—Discretion of Judge—Felony and Misdemeanor —Ind. Pen. Code—Letters Patent—Certificate of Advocate General.

By the practice of the Supreme Court at Bombay before the Indian Penal Code came into operation, on a trial for treason or felony the jury (as in England) was kept together during the night under the charge of officers of the Court; but on a trial for misdemeanor it was in the discretion of the Judge whether they should be kept together, or allowed to return to their homes for the night, the latter being generally done; and after the Code came into operation, the practice continued the same, as well in the Supreme Court, as subsequently in the High Court;—the Judges applying the Rule by determining whether the offence under trial would by the old law have been a felony or a misdemeanor.

Where the Judge, on a charge under Sec. 467 of the Ind. Pen. Code, permitted the jury to separate on the first day of the trial and before verdict:—

Held that the exercise of his discretion was not a matter to be reviewed by the High Court under Sec. 26 of the Letters Patent, there being no error in any point of law; as the offence charged was only a misdemeanor under the law in force before the Ind. Pen. Code took effect.

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THE prisoners were tried before Mr. Justice ANSTEY—then an Acting Judge of the High Court—and a Special Jury at the Third Criminal Sessions of 1865, charged in various counts with offences against the Indian Penal Code, and were found guilty, under Sec. 467, of having forged a "valuable security," and sentenced, the first and second prisoners, respectively to transportation for life, and the third prisoner to suffer rigorous imprisonment for four years; and the Court adjudged, under Sec. 62 of the Penal Code, that the rents and profits of the moveable and immoveable estates of the first and second prisoners, respectively, should be forfeited to Government.

The case* was now brought before the Court (consisting of COUCH, C. J., ARNOULD, WESTROPP and SARGENT, JJ.) under

* The Report is by the Editor, who was Acting Clerk of the Crown.

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Sec. 26 of the Amended Letters Patent of 28th December 1865, on the certificate of *The Honorable L. H. Bayley*, H. *M.'s Advocate General*, to whom it had been *represented* "that, in consequence of the length of the said trial, it was impossible that the same could be finished in the course of the first day, and that it became necessary to adjourn the hearing thereof until the next day" (the 30th of September 1865); "that when the Court rose, on the evening of the first day, to adjourn until the next day, the said presiding Judge in the exercise of his discretion, and without the consent of the said Dayál Jáiráj, Khatáo Ladhá and Kallianjí Ladhá, and of any or either of them, or of their or any or either of their counsel learned in the law, being asked or given, suffered and permitted each and every of the gentlemen of the said special jury, so empanelled as aforesaid, to separate and disperse for the night, and to retire to their several and respective houses and homes until the said Court should resume the hearing of the said trial upon the following morning, which the said gentlemen of the said special jury then thereupon severally and respectively accordingly did, without any person or persons having been sworn, affirmed, or directed to keep them together until the said Court should resume the hearing of the said trial upon the following morning;" and that the hearing of the said trial was resumed on the morning of the following day before the said presiding Judge and the same special jury, and was concluded in the evening of the same day, when the said prisoners were respectively found guilty and sentenced, &c.—which sentences they were still respectively undergoing. "And whereas, by reason of the premises aforesaid, it may be doubtful whether the said trial, convictions and sentences were, or any or either of them was, valid and legal: Now I, Lyttleton Holyoake Bayley, Her Majesty's Advocate General at Bombay, do under and by virtue of the power by the Amended Letters Patent for, &c., conferred upon Her Majesty's Advocate General at Bombay, HEREBY CERTIFY that certain points of law which had been decided by the said High Court of Judicature at Bombay in its Ordinary Original

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Criminal Jurisdiction aforesaid against the said Dayál Jáiráj, &c., should, in my judgment, be further considered by the said High Court, in this, that is to say, whether by reason of the separation and dispersion of the gentlemen of the said special jury between the first and second days of the said trial in manner aforesaid, the said trial of the said Dayál Jáiráj, &c., was not vitiated, and whether the said convictions and sentences of the said Dayál Jáiráj, &c., or some or one of them, were or was not in consequence illegal, and ought not to be set aside and reversed."

COUCH, C. J.—The prisoners' counsel should begin.

McCulloch (with him *Green* and *Hayllar*) for the Crown.—I have certain preliminary objections to take. (The *Advocate-General* does not appear here for the Crown, as he appeared for the prisoners at the trial.) It is too late now to object to any *mala praxis* which may have occurred during the trial. Objection should have been taken on behalf of the prisoners when, after the jury had been permitted to separate, the hearing of the trial was resumed. Another objection is the time which has elapsed since the conviction and sentence. [COUCH, C. J.—The Advocate General has here certified to the Court in the exercise of his discretion. He was not obliged to certify.] He merely wished to bring the whole matter before the Court for its opinion. [COUCH, C. J.—We are not to direct the Advocate General in the exercise of his discretion.] This certificate is not in accordance with the provision of the Charter; and deals rather with facts, which may be disputed, than with questions of law. *Mellor's Case* (*a*) shows what is meant under the English Statute (by which the Court for Crown Cases Reserved was established) by the words "any question of law shall have arisen at the trial;" and also *Stubbs' Case* (*b*). In a writ of error facts may be stated; but there the Court of Queen's Bench may decide that there has been a mis-trial, and that the case must be tried again. Under the Charter there is no power

(*a*) Dear. & Bell, 468. (*b*) 555, *Ibid.*

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to award a new trial. This mode of procedure by certificate is inconvenient.

COUCH, C. J.—We are all of opinion that this is the proper form in which to consider the case.

Howard (with him *Farran*) for *Dayál Jáiráj*; and (with him *Ferguson*) for *Kalliánjí Ladhá*.—It would seem to have been intended by the Charter (Secs. 25 and 26) to give to this Court the powers of the Court of Queen's Bench and of the Court of Crown Cases Reserved: Steph. Crim. L., p. 224. Under the old law the jury was not allowed to separate. The rule, however, was subsequently relaxed, in cases of mere misdemeanor; but that practice was again disapproved of: Co. Litt. 227 b.; 3 Inst. 110.; Ld. Raymond 84; 1 Ventris 69; 2 Hale, P. C. 294; Hawkins, P. C., 622; *Lord Delamere's Case*, 11 St. Tr., *per Herbert*, Ld. C.J. I shall now show to what extent the relaxation was allowed in modern times. [COUCH, C. J.—Sec. 38 of the New Charter leaves the practice as it was in the Supreme Court; and that practice is well known to this Court. It was the same as the practice of the Courts in England, which is quite settled.] I shall contend that the punishment attached to the offence in this case, under Sec. 467 and Sec. 62 of the Penal Code, makes it a felony. [COUCH, C. J.—Before the Penal Code the offence would only have been a misdemeanor: you must show that it became a felony by the Code.] It is for the Crown to draw the distinction. I contend that the old law applies to every case which is not shown to be *not a felony*. 1 Russ. Cri. 45; Steph. Crim. L. 56.

Pigot, Dunbar and *Scoble* for *Khatáo Ladhá*.—The conviction in this case cannot be supported. *Hardy's Case* (*c*), *Kinnear's Case* (*d*), *Reg.* v. *Fowler* (*e*), *Caroline Winsor's Case* (*f*). The offence of which the prisoners were found guilty was a felony in everything but the name. It was neither a misdemeanor by enactment, nor by analogy. The prisoner

(*c*) 24 St. Tr. 417.
(*d*) 2 B. & Ald. 462.
(*e*) 4 B. & Ald. 273.
(*f*) Law Rep. 1 Q. B. 289, 309.

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here is not in the position of a person tried for a misdemeanor in the Supreme Court. The nature of the offence was altered by the punishment imposed by the Penal Code. The real question here is, was the case one in which the Judge had a right to exercise his discretion at all. Unless it can be shown that the offence was a misdemeanor, the Judge was wrong. Had the offence in this case been made a felony by the Statute of 9 Geo. IV. c. 74, it would certainly be considered to remain so. Sec. 62 of the Penal Code points out a class of cases analogous to felonies; and to which all the incidents of procedure in cases of felony should be applied. The Judge committed an error in law in holding that the case was one of misdemeanor, and in then exercising his discretion. The case was one of felony according to analogy.

December 7.

McCulloch, Green and *Hayllar* for the Crown.—No ground for avoiding the verdict has been shown, and no precedent for such a course. It is contended that the Judge was not right in allowing the jury to separate. That is not the question, but whether the Judge had a discretion by law. In the present case the offence was not made a felony by 9 Geo. IV., c. 74, s. 72; nor would the Court allow a criminal enactment to be strained by an equitable construction so as to make an offence a felony. What, then, was the effect of the Penal Code? It has not abolished the distinction between felony and misdemeanor; but it has not made any offence a felony. All offences under it are in the nature of misdemeanors. The essence of a felony is that it has as its consequence forfeiture; and the nature or the extent of the punishment is not the proper test: Russ. Cri.; Hawkins P. C. Every offence not originally a felony or made one by statute is at law a misdemeanor. All the decisions have been based on the technical distinction; not on considerations of the gravity of the offence or the severity of the punishment. There was no practice that in the High Court juries in such cases of forgery as the pre-

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sent were not allowed to separate. The Judge is not bound by a principle of analogy. He can exercise his discretion until a practice has been established. The essence of discretion is freedom of opinion in the Judge; and the cases show that it cannot be reviewed. *Reg.* v. *Wolf* (*g*). There was no rule except that of the Supreme Court, which obtained when the Penal Code was introduced, and before the High Court was established, and which was grounded on the distinction between felony and misdemeanor. [ARNOULD, J.—I may mention that Sir M. SAUSSE, C. J., and I agreed to observe that rule when the Penal Code came into force here; and the rule was, I believe, always followed in the Supreme Court. WESTROPP, J.—It has also been followed in the High Court.] If there is any rule on the subject, it is the old rule; if there be no rule, the Judge may exercise his discretion in all cases under the Penal Code, as he would have done formerly in cases of misdemeanor, and that discretion is not subject to review.

Howard in reply.—That the jury should not be discharged unnecessarily is an admitted principle. The discretion of the Judge, if he had a right to exercise it, was certainly not wisely exercised. I contend that, with respect to procedure, all the offences in the Penal Code are to be treated as felonies; and that if the distinction has been abolished, the old strict rule should be applied. I object to have the exception extended into a rule. If the distinction into felonies and misdemeanors still obtains, upon what principle is the distinction into two classes to be based? The nature of the punishment is the only sound test. The Penal Code is founded on definitions, not on enumeration.

Pigot in reply.—The real point is, can the case be treated as if it were a misdemeanor in England? If so it would be difficult to get out of the rule of the Supreme Court. The rule in *Kinnear's Case* amounts to this: that the practice had grown up in cases of misdemeanors, and that it could not, therefore, be said to be against the law. But the question

(*g*) 31 Law J., Mag. Ca.

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here is, had the Judge any discretion to exercise? The technical distinction no longer existing, we should ascertain the principle and apply it to offences under the Penal Code. The Penal Code does not employ the words "felony" and "misdemeanor." But it distinctly divides crimes into two classes, analogous in respect of punishment to those called in England felonies and misdemeanors; and the principles laid down in *Kinnear's Case* should be applied here just as if the Penal Code had described these classes as they are known in England. The apparent anomalies in the punishments attached to felonies and misdemeanors in England may be explained by the tendency of modern legislation to the mitigation of punishments on the one hand, and by the increase of cases of importance on the other hand.

Cur. adv. vult.

December 20.

COUCH, C. J.—The trial in this case took place when the original Letters Patent constituting the High Court, dated the 26th of June 1862, were in force. By the 38th clause of those Letters Patent it was ordained that the proceedings in all criminal cases which should be brought before the High Court in the exercise of its ordinary original criminal jurisdiction, and also in all other criminal cases over which the Supreme Court then had jurisdiction, should be regulated by the procedure and practice then in use in the Supreme Court.

The Letters Patent of the 28th of December 1865, by virtue of which the High Court now exercises its jurisdiction, continue this by ordaining in Clause 38 that the proceedings in such criminal cases shall be regulated by the procedure and practice which was in use in the High Court immediately before their publication, subject to any law which had been or might be made in relation thereto by competent legislative authority for India.

Now the practice of the Supreme Court, upon the adjournment of a criminal trial, before the Indian Penal Code came

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into operation, was the same as the practice of the courts in England. That practice was that the jury on a trial for treason or felony were kept together during the night under the charge of officers of the Court; but on a trial for misdemeanor it was in the discretion of the Judge whether they should be kept together, or should be allowed to return to their homes for the night, the latter being generally done: *Rex* v. *Kinnear* (*h*). From this case it appears that this had become the practice in the year 1819; and it has continued to be so to the present time.

In the Indian Penal Code there is no such division of offences as that of felonies and misdemeanors, the word "offence" being used to denote anything made punishable by the Code, and the gravity of the offence being measured only by the punishment which may be awarded for it; but we have the authority of two of the members of this Court—one of whom was a Judge of the Supreme Court, and the other the leading counsel in the Court—for saying that the practice of the Supreme Court continued to be the same after the Indian Penal Code came into operation, and that the Judges applied the rule by determining whether the offence under trial would by the old law have been a felony or a misdemeanor. Except in the few cases where a new offence is created by the Penal Code—and these may well be left in the discretion of the Judge—there is no difficulty in doing this; and it is always in the power of the Judge, by the exercise of his discretion, to prevent any anomaly that might be caused by a rigid application of the rule.

The offence with which the accused were charged in this case was, under the law which was in force before the Indian Penal Code took effect, only a misdemeanor, as the instrument forged did not come within the description of any of the instruments in Sec. 72 of the 9 Geo. IV., c. 74, the forgery of which was a felony. It is true that by virtue of

(*h*) 2 B. & Ald. 462.

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Sec. 467 of the Penal Code, and the definition in Sec. 30 of the words "valuable security," the punishment for it is now the same as for the offence described in the 9 Geo. IV., c. 74, and that the Court has power to adjudge the forfeiture of the rents and profits of the moveable and immoveable estate of the convict during the period of his transportation or imprisonment; but that does not make the offence a felony: 1 Hawk. P. C., bk. 1, c. 7, s. 6.

It is still possible to apply the rule of practice of the Supreme Court, and we are bound by the Letters Patent to apply it. According to that practice, it was in the discretion of the Judge in such a case as the present, whether he should allow the jury to separate; and the exercise of his discretion is not a matter to be reviewed by this Court, under Sec. 26 of the Letters Patent, there being no error in any point of law. If any authority were necessary for this proposition it is to be found in the judgments of the Judges in the case of *Winsor* v. *The Queen* and the cases there referred to (*i*).

We, therefore, hold that no good cause has been shown in this case for our reversing the conviction.

(*i*) Law Rep. 1 Q. B. 289; affirmed by the Ex. Cham. in Error, *Ibid.*, 309.

REG. *v.* GUNA' bin RAGNA'K and others.

District Magistrate——Illegal Circular——Crim. Proc. Code, Sec. 277.

On a reference by a Session Judge, Circulars issued by a District Magistrate—forbidding all the Subordinate Magistrates from taking up cases, if they think they shall have to act under the provisions of Sec. 277 of the Crim. Proc. Code—annulled, as beyond the competence of the District Magistrate, and based on a misunderstanding of Sec. 277.

1866. August 9. Referred Case.

THE record and proceedings in this case were referred for the orders of the High Court by R. H. Pinhey, Session Judge of the Konkaṇ, by whom the following judgment was recorded:—

"Read an extract from the Report of Criminal Cases disposed of by the District Magistrate and Magistrates F. P. in the Ratnágirí District during the month of May 1866, wherein the accused, Guná bin Ragnák and two others, are reported as having been convicted of the offence of theft, and sentenced, under Sec. 379 of the Indian Penal Code and Act VI. of 1864, by James Richard Naylor, Magistrate F. P. in the Ratnágirí District, as follows:—'Accused Guná (No. 1) and Yesá (No. 2) to suffer two months' rigorous imprisonment and to pay a fine of Rs. 20 each. Accused Kusá (No. 3) to suffer four months' imprisonment and to pay a fine of Rs. 50, and to receive twenty stripes.'

"Read and recorded the writ issued by the Konkaṇ Court of Sessions to the Magistrate of the Ratnágiri District, calling for a certified copy of the circular order issued by him in August 1865 to Sub-Magistrates, and the return thereunto made by the said Magistrate of the District; and copies of two circular orders therewith certified.

"The circular orders are as follow:—

'(No. 23.)

[Translated from the original Maráṭhí.]

'To the Subordinate Magistrates.

'The Honourable the High Court have ruled that all cases received from Subordinate Magistrates under Sec. 277 of

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the Code of Criminal Procedure should be disposed of by the Magistrate of the District. As the observance of this procedure will occasion great inconvenience and hardship to persons connected with such cases, by their being compelled to travel over long distances, I direct that if, in the course of your inquiries into any case, you should consider that the offence, if established against the accused, is such as to call for a more severe punishment than you are competent to adjudge, you should at once stay proceedings, and send the case for trial, with the parties concerned in it, to the officer in charge of the Prânt (District Táluká), who will then proceed with it *de novo*. You are on no account to send up to me any case under Sec. 277. Dated 27th May 1863.

(Signed) J. W. ROBERTSON,
'District Magistrate.

'(No. 31.)

[Translated from the original Maráthí.]

"To the Sub-Magistrates 2nd Class.

"In modification of circular order No. 23, dated 27th May 1863, directing that all cases in which more severe punishment than you are competent to adjudge is called for should not be submitted to the Húzúr, it is hereby enjoined that you should, before commencing any inquiry into cases brought before you, carefully consider the nature of the offence charged against the accused; and should you on consideration be of opinion that the offence charged, if proved, would call for a severer punishment than you are authorised to award, you should, instead of proceeding with them, request the Foujdár to forward them to the officer in charge of the Prânt (District Táluká). You are to proceed with such cases only as may *primâ facie* appear to you to call for no heavier punishment than you are competent to adjudge. If, however, on completion of the inquiry, you may be led to think that the offence proved in any such case requires a higher punishment than what you can award, you should record your finding, with the reasons thereof, and forward

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the record of the said case with the accused direct to the Húzúr (District Magistrate), you should not send witnesses &c. The cases referred to will be very rare indeed if the nature of the offence charged against the accused be carefully considered in the first instance before entering upon trial. Dated 2nd August 1865.

'(Signed) H. B. BOSWELL,

'District Magistrate.'

"I am of opinion that both these circulars are illegal, and beyond the District Magistrate's competence. It appears to me that a District Magistrate is not competent by circular to forbid all the Subordinate Magistrates in his district from taking up cases which the Criminal Procedure Code says they may take up, if they think they shall have to act under the provisions of Sec. 277 of the Code in disposing of the case. * * *

"Both these circulars proceed on a mistaken view of the requirements of Sec. 277. (a) It is not necessary under this section for the Subordinate Magistrate to forward either the accused or the witnesses in the case to the District Magistrate. By the first part of the section the Subordinate Magistrate need only submit his proceedings to the District Magistrate. By the second part of the section, after the proceedings have been received by the District Magistrate, he may send for the accused, or for any witnesses he pleases, if necessary.

"Besides considering these circulars illegal, I am of opinion that they must be productive of inconvenience, instead of preventing inconvenience, to witnesses and others concerned in criminal cases. There are never more than three, and there are now only two, F. P. Magistrates for the whole district of Ratnágirí, which extends from Bánkot to

"(a) Sec. 277. If in any case tried by a Subordinate Magistrate having jurisdiction in which the accused person is found guilty, such Magistrate shall consider the offence established against the accused person to call for a more severe punishment than he is competent to adjudge, he shall record the finding and submit his proceedings to the Magistrate to whom he is subordinate, and such Magistrate shall pass such sentence or order in the case as he may deem proper, and as shall be according to law. In any such case the Magistrate to whom the proceedings are submitted may examine the parties, and recal and examine any witness who shall already have given evidence in the case, and he may call for or take any further evidence."

1866. August 9. Referred Case.

Goa. Both these F. P. Magistrates are during the monsoon at Ratnágirí. As it is not necessary for the Subordinate Magistrates to send up the accused and witnesses to the District Magistrate, under Sec. 277 of the Code of Criminal Procedure, in the first instance, it would be clearly more for the convenience of the public if the Subordinate Magistrates were to dispose of as many cases as they legally can under Sec. 277, than if all such cases were sent for trial to the F. P. Magistrates.

"Therefore, on the grounds both of law and expediency, I think both these circulars should be cancelled and withdrawn.

"It is not, I believe, within my power to call on the District Magistrate to cancel these circulars, or rather to cancel them myself, or compel the District Magistrate to cancel them. It is, therefore, necessary that a copy of this judgment, together with all the papers now before the Court of Session, be forwarded for the orders of Her Majesty's High Court of Judicature at Bombay."

The case came on for hearing this day before COUCH, C. J., NEWTON and GIBBS, JJ.

PER CURIAM :—The Court reverses the convictions and sentences; and annuls the Magistrate's circulars.

REG. *v.* RATANRA'V bin MAHA'DEVRA'V CHAVA'N.

Illegal sentence altered——Ind. Pen. Code, Sec. 188.

A sentence of *rigorous* imprisonment passed by a Magistrate F. P., under Sec. 188 of the Ind. Pen. Code, for disobedience to an order duly promulgated by a public servant, altered to one of *simple* imprisonment; as the Magistrate's finding did not show that the case came within the latter part of the section, in which case alone the infliction of rigorous imprisonment was authorised.

October 3. Referred Case.

THE prisoner was convicted by A. K. Nairne, Magistrate F. P. in the Ratnágirí District, of disobedience to an order duly promulgated by a public servant, by forcibly taking possession of a field; and sentenced to suffer rigorous imprisonment for twenty days, and to pay a fine of ten rupees, or in default of payment to suffer further rigorous imprisonment for ten days.

1866. October 3. Referred Case.

The record and proceedings were called for, on a review of the District Magistrate's monthly criminal return, by R. H. Pinhey, Session Judge of the Konkan, by whom they were referred for the orders of the High Court, on the 19th of September 1866, with the following remarks:—

"The sentence of rigorous imprisonment passed by the Magistrate F. P. in this case is illegal.

"The accused was convicted by the F. P. Magistrate of disobedience to an order duly promulgated by a public servant, in having taken possession of a field upon which he had been ordered by the Magistrate not to encroach. The accused, therefore, committed an offence punishable under the first part of Sec. 188 of the Indian Penal Code, and with simple imprisonment only.

"I notice that there has been a good deal of illegal procedure in this case. The complaint was laid on the 6th of June 1866, before the F. P. Magistrate, who should have examined the complainant on solemn affirmation, and issued a summons to the accused. Instead of doing this, the Magistrate referred the complaint for inquiry to the Sub-Magistrate at Velamb, who referred it to the Foujdár at Velamb, who, after some inquiry, applied to the Magistrate for a warrant for the apprehension of the accused, as he could not find him. Although no summons had been issued, and although the police had no right to apprehend him, the Magistrate F. P. issued his warrant for the apprehension of the accused on the representation of the Foujdár. The Foujdár, armed with this warrant, apprehended the accused, and proceeded with his inquiry, examining all the witnesses and the accused. The Foujdár then handed up the case to the F. P. Magistrate, who tried it. The procedure described above is more like that required by the repealed Code of 1827, than that laid down in the Criminal Procedure Code. I further observe that the Magistrate did not incorporate in his proceedings a translation of the reasons for his finding and sentence, as required by Sec. 429 of the Code of Criminal Procedure."

The case came on for hearing this day before COUCH, C.J., NEWTON and WARDEN, JJ.

1863. October 3. Referred Case

PER CURIAM:—The Court alters the sentence from one of rigorous to one of simple imprisonment; as the Magistrate's finding does not show that the case came within the latter branch of Sec. 188 of the Indian Penal Code.

The Session Judge is requested to communicate his remarks to the Magistrate.

Sentence altered.

NOTE.—"Whoever, knowing that by an order promulgated by a public servant lawfully empowered to promulgate such order he is directed to abstain from a certain act, or to take certain order with certain property in his possession or under his management, disobeys such direction, shall, if such disobedience cause or tends to cause obstruction, annoyance, or injury, or risk of obstruction, annoyance, or injury, to any person lawfully employed, be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to two hundred rupees, or with both; and if such disobedience causes or tends to cause danger to human life, health, or safety, or causes or tends to cause a riot or affray, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both."—*Ind. Pen. Code, Sec.* 188.

"It shall be lawful for any Magistrate, by a written order, to direct any person to abstain from a certain act, or to take certain order with certain property in his possession or under his management, whenever such Magistrate shall consider that such direction is likely to prevent or tends to prevent obstruction, annoyance, or injury, or risk of obstruction, annoyance, or injury, to any person lawfully employed, or is likely to prevent or tends to prevent danger to human life, health, or safety, or is likely to prevent or tends to prevent a riot or an affray."—*Crim. Proc. Code, Sec.* 62.—ED.

REG. *v.* DEVSA'NVAT bin SHIVRA'MSA'NVAT.

Stamp Act XXXVI. of 1860, *Sec.* 26—*Crim. Proc. Code, Secs.* 66 *and* 67—*Irregular Procedure.*

Conviction and sentence for an offence under a Stamp Act reversed on a reference by a Session Judge; as the proceedings of the Magistrate who tried the case were highly irregular.

October 3. Referred Case.

THE prisoner was convicted by Rámchandra Amrit Dugal, Magistrate F. P. at Ratnágirí, under Sec. 26 of Act XXXVI. of 1860, of having sold an old stamped paper of the value of two annas; and sentenced to pay a fine of one rupee, or in default to suffer simple imprisonment for two days.

1866. October 3. Referred Case.

The record and proceedings were referred for the orders of the High Court, on the 19th of September 1866, by R. H. Pinhey, Session Judge of the Konkan, with the following remarks:—

"I sent for this case to see whether the prosecution had been commenced by the Collector of Stamp Revenue, as required by Sec. 37 of Act XXXVI. of 1860. In a certain sense the Collector of Stamp Revenue did commence the prosecution, for he wrote a Maráthí endorsement telling the 'Húzúr Deputy Magistrate' to inquire into the case, and report the result. Here was a double mistake. The F. P. Magistrate should not have been called by the obsolete title of 'Húzúr Deputy Magistrate;' and it is not proper to commence a prosecution by writing a note or letter to the Magistrate whom the prosecutor wishes to take up a case. The Collector was not acting in this case as the Magistrate's official superior, but as a prosecutor on behalf of Government; and he should, therefore, have either made the complaint in person, or instructed a pleader to do so.

"Turning to the Magistrate's proceedings in the case, I find it recorded:—'The substance of the above complaint having been stated to the accused, Devsánvat bin Shivrámsánvat, he admitted the truth of the complaint, and showed no sufficient cause why he should not be convicted. He is, accordingly, convicted.' What the above complaint signifies is not discoverable from the record: for there is absolutely no complaint on the record. The Collector's endorsement certainly cannot be considered a complaint, for the words used therein are merely '*ápalekadún sadarhuvishiñ tajvíj hoún kaseñ jáleñ teñ samjáveñ*' (*i.e.*, you should inquire concerning the above matter and report the result).

"I am of opinion that a conviction so irregularly obtained ought not to be upheld.

"I also remark that the Magistrate issued a summons to the accused without having any complaint sworn before him, as required by the provisions of Secs. 66 and 67 of the Code of Criminal Procedure."

1866. October 3. Referred Case.

The case came on for hearing this day before COUCH, C. J., NEWTON and WARDEN, JJ.

PER CURIAM :—The Court reverses the conviction and sentence; and the Session Judge is requested to send a copy of his remarks on the case to the Magistrate, and to communicate to him the opinion of the Court that his proceedings in the case were highly irregular.

Conviction and sentence reversed.

NOTE.—In *Reg.* v. *Chinto Atmárám* and others, convictions and fines by C. B. Pritchard, F. P. Magistrate in the Tháná District, were, on a reference by the Session Judge, reversed by COUCH, C.J., and NEWTON, J., on the 6th of March 1867, for a similar neglect to comply with Sec. 52 of the Stamp Act, No. X. of 1862.—ED.

REG. v. MALHA'RJI bin NAULOJI.

Penalty for breach of Town Rule—Act XXVI. of 1850—*Subordinate Magistrate—Jurisdiction.*

Held that a Subordinate Magistrate has no jurisdiction to impose a penalty for breach of a rule made by Town Commissioners under Act XXVI. of 1850, Sec. VII., cl. 5.

November 21. Referred Case.

THIS was a reference by the District Magistrate of Puná, nnder Sec. 434 of the Code of Criminal Procedure.

Malhárji was charged with having committed a breach of a rule made by the Town Commissioners of Puná, in having built a house on the side of the public road without obtaining the consent of the Commissioners; and was convicted by Moro Vináyak, First Class Subordinate Magistrate, and sentenced to pay a penalty of two rupees, under Act XXVI. of 1850, Sec. VII., cl. 5.

The case was heard this day before COUCH, C.J., and NEWTON, J.

PER CURIAM :—The Court annuls the conviction and sentence, and orders the fine, if paid, to be restored; as the payment of the penalty could only be enforced by a Full Power Magistrate, and not by a Subordinate Magistrate, who had no jurisdiction to impose it.

Conviction and sentence annulled.

REG. v. YELLA' valad PARSHIA'.

Whipping Act, No. VI. of 1864—*Punishment for Attempts—Ind. Pen. Code, Sec.* 511.

In the case of a conviction of attempting to commit housebreaking by night, with intent to commit theft, a sentence of whipping was annulled as being illegal.

1866. November 21. Crim. Review.

THE prisoner was convicted by J. F. Armstrong, District Magistrate of Kaládgi, of attempting to commit housebreaking by night, with intent to commit theft; and sentenced to suffer eighteen months' rigorous imprisonment, and to receive fifty lashes, under Secs. 457 and 511 of the Indian Penal Code, and Sec. 3 of Act VI. of 1864.

The record and proceedings were reviewed this day by COUCH, C.J., and NEWTON, J.

PER CURIAM:—The Court annuls the sentence of whipping; as the law does not authorise the infliction of that punishment for the offence of which the prisoner has been convicted.

Sentence of whipping annulled.

NOTE.—By Sec. 511 of the Ind. Pen. Code, "whoever attempts to commit an offence punishable by this Code with transportation or imprisonment, or to cause such an offence to be committed, and in such attempt, &c. shall, where no express provision, &c., be punished with transportation or imprisonment of any description provided for the offence, for a term," &c. Under the Whipping Act whoever *commits* any of the offences specified in Sec. 2 may be punished with whipping *in lieu of* any punishment to which he is liable under the Penal Code, and in case of previous conviction of the same offence *in lieu of* or *in addition to* such other punishment: Sec. 3; and whoever, having been previously convicted of any of the offences specified in Sec. 4, shall be again convicted of the same offence, shall be liable to whipping *in addition to* any other punishment provided by the Penal Code. "*Attempting* to commit *robbery*" is the only attempt included among the offences specified in Sec. 4.—ED.

REG. *v.* SU'RYA' bin KRISHNA MA'NDAVKAR.

Whipping Act, No. VI. of 1864—*Previous Conviction.*

On a reference by a Session Judge, under Sec. 434 of the Crim. Proc. Code, a sentence of whipping in addition to one of rigorous imprisonment, in the case of an offence specified in Sec. 2 of Act VI. of 1864, was annulled: as the offence was not *committed* after previous conviction.

1866. December 12. Referred Case.

THE prisoner was charged before Rámchandra Amrit Dugal, Magistrate F. P. in the Ratnágirí District, with three several instances of theft (Cases Nos. 133, 134, and 135) committed respectively on the 20th of August, the 15th of August, and the 23rd of July, 1866; and was convicted on the 20th of September in Nos. 133 and 134, and on the 21st of September in No. 135, in which case he was sentenced to suffer six months' rigorous imprisonment, *and* to receive fifty stripes, under Sec. 379, Ind. Pen. Code, and Act VI. of 1864, Secs. 2, 3, and 9.

The records and proceedings had been called for by R. H. Pinhey, Session Judge of the Konkan, on a review of the District Magistrate's monthly report; and were referred for the orders of the High Court, under Sec. 434 of the Code of Criminal Procedure, on the 28th of November, with a view to the sentence of whipping *in addition to* imprisonment in Case No. 135 being reversed: it appearing to be illegal, as the offence was not *committed* after previous conviction.

The case came on for hearing this day before COUCH, C.J., NEWTON and WARDEN, JJ.

PER CURIAM:—The Court annuls the sentence of whipping; as, in cases of offences specified in Sec. 2 of the Act, the law does not authorise the infliction of that punishment *in addition to* any other punishment to which the offender may be liable under the Indian Penal Code, unless where the offence has been committed after a previous conviction of the same offence.

Sentence of whipping annulled.

REG. v. SADU valad PAVADI.

Retailing opium without license—Reg. XXI. of 1827—*"Zillah Magistrate"—Jurisdiction.*

A conviction and sentence by a Full Power Magistrate for breach of the rules for the retail sale of opium, under Reg. XXI. of 1827, Sec. 10, annulled for want of jurisdiction: as 'the Zillah Magistrate' alone was empowered to enforce the penalty.

1866. December 5. Crim. Review.

SADU was charged with retailing opium without having previously obtained a license, contrary to the provisions of Reg. XXI. of 1827, Sec. 10; and was convicted by Vishṇu Parasharám, F. P. Magistrate at Solápúr, and sentenced to pay a fine of forty rupees, or in default to undergo simple imprisonment for forty days.

The record was called for and reviewed this day by COUCH, C.J., NEWTON and WARDEN, JJ.

PER CURIAM :—The Court annuls the conviction and sentence, and orders the fine, if paid, to be restored; as the District Magistrate alone had jurisdiction to try the case.

Conviction and sentence annulled.

NOTE.—"The penalty * * * shall be enforced by information before the Zillah Magistrate or Criminal Judge (according to the general code) if the act were committed within the jurisdiction of any Zillah Court."—Reg. XXI. of 1827, Sec. VII., cl. 1. And for the meaning to be put on the term 'Zillah Magistrate' see *Reg. v. Prabhákar N. Soman, antè, p.* 11.—ED.

REG. v. KRISHNA'JI BA'PUJI GA'IKAVA'D.

Security for Good Behaviour—Irregular Sentence by Magistrate—Crim Proc. Code, Secs. 296 and 434.

A direction annexed to a sentence of imprisonment under Sec. 448 of the Ind. Pen. Code—that the convict be brought up, at the expiration of the sentence, in order that he may give security for good behaviour for the period of one year—reversed: as not being authorised by Sec. 296 of the Crim. Proc. Code.

1867. January 30. Referred Case.

THE prisoner was convicted by W. H. Havelock, District Magistrate at Thánà, of house trespass, under Sec. 442 of the Penal Code; and sentenced to suffer six months' rigorous imprisonment, "and, at the expiration of the sen-

1867. January 30. Referred Case.

tence, to be brought up, in order that he may give security for good conduct for the period of one year, under Sec. 296 of the Code of Criminal Procedure."

The Magistrate also recorded the following remarks in column 18 of his Return:—"The accused was in confinement for six months in 1865, for having failed to give security for good conduct."

The record and proceedings were called for by R. H. Pinhey, Session Judge of the Konkan, who recorded the following remarks:—

"Sec. 296 of the Code of Criminal Procedure contemplates special proceedings being held preparatory to making an order for security. From the statement in column 13 it would seem that the order for security forms a part of the sentence.

"I am of opinion that the record and proceedings must be referred for the orders of the High Court, under Sec. 434 of the Code of Criminal Procedure.".

The case came on for hearing this day before COUCH, C.J., and NEWTON, J.

PER CURIAM:—The Court reverses that portion of the sentence which orders the prisoner to be brought up at the expiration of the six months' imprisonment, as not authorised by Sec. 296 (*a*) of the Code of Criminal Procedure.

The prisoner may, upon his discharge from the six months' imprisonment, if it be thought right that it should be done, be brought up and dealt with under Sec. 296.

Sentence amended.

(*a*) Sec. 296.—"Whenever it shall appear to the Magistrate of the District or to an Officer exercising the powers of a Magistrate, from the evidence as to general character adduced before him, that any person is by repute a robber, housebreaker, or thief, or a receiver of stolen property knowing the same to have been stolen, or of notoriously bad livelihood, it shall be competent to such Magistrate or other Officer as aforesaid to require security for the good behaviour of such person for a period not exceeding one year."

REG. v. MÀLHA'RI bin SHIVJI.

Bombay Ferries' Act, No. XXXV. of 1850—Construction.

On a reference by a Session Judge, a conviction and sentence by a District Magistrate, under the Bombay Ferries' Act, for conveying passengers for hire from U'ran to Bombay was reversed; as the act charged did not constitute an offence under any section of the Act.

1867. March 6. Referred Case.

THE accused was convicted by W. H. Havelock, District Magistrate of Thán̈á, under Secs. 14, 15, and 16 of Act XXXV. of 1850, of having conveyed passengers for hire from the island of U'ran across the harbour to Bombay, without the special license of the Governor in Council; and sentenced to pay a fine of Rs. 20, to be recovered by distraint.

The record and proceedings were called for, on a review of the Magistrate's monthly criminal return, by R. H. Pinhey, Session Judge of the Konkaṇ, who recorded the following remarks:—

"The act stated in column 1 does not constitute an offence under Sec. 14 of Act XXXV. of 1850. That section applies to persons conveying for hire passengers '*from* any part of the Islands of Bombay and Colaba across the harbour of Bombay to the mainland, or *to* any of the adjacent Islands;' but does not make penal the conveying for hire of passengers from islands in the harbour to Bombay.

"The case must be referred to the High Court, under Sec. 434 of the Code of Criminal Procedure, with a view to the conviction and sentence recorded by the Magistrate being reversed.

"The Magistrate's interpretation of Sec. 14 of the Ferries' Act (No. XXXV. of 1850) appears to me quite inadmissible, and altogether opposed to the well-known principle that penal clauses in a statute are to be interpreted strictly.

"I am also of opinion that the Magistrate is wrong in arguing that the act of the accused, if not penal under Sec. 14, is penal under Sec. 15. Secs. 14 and 15 refer to different waters. Sec. 14 makes certain acts penal in the Bombay

1867. March 6. Referred Case.

Harbour. Sec. 15 makes certain other acts penal in 'any *other* arm of the sea, creek, or river' in the Bombay Presidency. The word *'other'* in Sec. 15 appears to me to exclude the Harbour of Bombay, for which special provision is made in the preceding section.

"It appears probable that the act of the accused is a *casus omissus;* but this is by no means certain, and even if it were certain, it would not be proper for a court of criminal jurisdiction to legislate, or to supply omissions made by the Legislature, by declaring acts penal for which the Legislature has prescribed no penalty."

The case came on for hearing this day before COUCH, C.J., and NEWTON, J.

PER CURIAM:—The Court reverses the conviction and sentence; as the act charged does not constitute an offence under the Bombay Ferries' Act.

Conviction and sentence reversed.

REG. v. RAGHOJI bin KA'NOJI.

Ind. Pen. Code, Secs. 416 *and* 177—*Crim. Proc. Code, Secs.* 426 *and* 434.

On a reference by a Session Judge, in reviewing the monthly magisterial returns, where the conviction by the Magistrate was for cheating by personation, and the offence appeared to the High Court to be furnishing false information,—for which the punishment awarded was legal:—

Held that the Court, under Sec. 426 of the Crim. Proc. Code, ought not to interfere with the conviction or sentence.

March 6. Referred Case.

THE accused was convicted, in the month of December 1866, by A. K. Nairne, Magistrate F. P. in the Ratnágirí District, of the offence of cheating by personation, and thereby inducing the delivery of a stamped paper; and sentenced to pay a fine of one rupee, or in default to suffer one day's simple imprisonment, under Sec. 417 of the Indian Penal Code.

The record and proceedings had been called for, on a review of the Magistrate's monthly return, by R. H. Pinhey, Session Judge of the Konkan,—who had noted that the sen-

tence appeared to be very inadequate to the offence charged; and were now referred, under Sec. 434 of the Criminal Procedure Code, for the orders of the High Court, with a view to the reversal of the conviction and sentence, with the following remarks:— 1867. March 6. Referred Case.

"By the definition of cheating given in Sec. 415 of the Indian Penal Code it is necessary that the offender should do something fraudulently or dishonestly, or with the intention to deceive, if he be convicted of cheating. I am unable to see, from the record and proceedings in this case, that the accused did anything fraudulently, dishonestly, or with the intention to deceive. Yesu gave accused four annas with which to buy a stamp for him (Yesu); and when the stamp vendor asked accused his name, he gave Yesu's instead of his own,—as it appears to me from stupidity, and not with any wish to deceive."

The case was heard by COUCH, C.J.. and NEWTON, J.

PER CURIAM:—The Session Judge should inform the Magistrate that the offence was not cheating by personation, but an offence under Sec. 177 of the Indian Penal Code; but Sec. 426 of the Code of Criminal Procedure makes it unnecessary for the Court to interfere.

No order.

Reg. v. SAMSEN BA'BA'JI.

Crim. Proc. Code, Sec. 44—Compensation.

On a reference by a Session Judge, an order made by a Magistrate under Sec. 44 of the Criminal Procedure Code—awarding compensation to the complainant out of a fine inflicted for causing hurt—reversed: as there was no evidence on the record to show that "loss" was caused, or that "any special damage of a pecuniary nature resulted" to the complainant by the offence.

THE accused was convicted, in the month of January 1867, by W. M. Salmon, Magistrate F. P. in the Thánà District, of the offence of voluntarily causing hurt; and sentenced to pay a fine of Rs. 50, or in default to suffer two months' simple imprisonment, under Sec. 321 of the Indian May 1. Referred Case.

1867. May 1. Referred Case.

Penal Code : Rs. 10 to be paid to the complainant for compensation, under Sec. 44 of the Code of Criminal Procedure.

The record and proceedings were referred for the orders of the High Court, by R. H. Pinhey, Session Judge of the Konkan, with the following remarks :—

"I am of opinion that the award of Rs. 10 as compensation to complainant is not warranted by the provisions of Sec. 44 (*a*) of the Code of Criminal Procedure; for there is no evidence on the record that 'loss' was caused to the complainant by the offence charged, or that 'any special damage of a pecuniary nature' resulted to the complainant by such offence.

The case was heard by COUCH, C.J., and NEWTON, J.

PER CURIAM :—The Court reverses so much of the sentence passed upon the accused as awards compensation to the complainant.

(*a*) Sec. 44.—In cases in which, by the sentence or order of any Criminal Court, a fine is imposed upon a conviction for any offence made punishable by fine, whether the offence be punishable or punished by fine only or otherwise, it shall be lawful for such Court to order that the fine, or any part thereof not exceeding the loss appearing to be caused to the person who has suffered by such offence, and any special damage of a pecuniary nature that may have resulted to such person by such offence, and any expenses incurred by the complainant in the prosecution, as the Court may consider reasonable and proper, be paid to or for the benefit of such person, according to the direction of the Court : and in every such case the fine, when levied or paid, shall be paid and distributed accordingly. If the fine be awarded by a Court whose decision is subject to revision, the amount awarded to the person injured shall not be paid to such person until a period of two months shall have elapsed from the date of the award.

REG. v. A'BDUL KA'DAR valad BA'LA' A'BUJI.

Extortion—Ind. Pen. Code, Sec. 383—Crim. Proc. Code, Sec. 404.

A conviction of extortion by a Full Power Magistrate, and an order of a Session Judge rejecting an appeal therein, reversed by the High Court, under Sec. 404 of the Crim. Proc. Code : as there was no such *fear of injury* as is contemplated by Sec. 383 of the Ind. Pen. Code; nor was the delivery of money by the complainants *thereby induced;* nor did it appear from the evidence that the money was obtained *dishonestly* by the prisoner, who might have demanded it, believing in good faith that he was entitled to it.

1866. Oct. 31. Crim. Review.

THE petitioner was convicted, on the 7th of July 1866, under Sec. 383 of the Indian Penal Code, of the offence of extortion, by C. B. Pritchard, Magistrate F. P. in the Tháná District, by whom the following finding was recorded :—

"The accused, A'bdul Kádar, is a man who purchased from Government the privilege of carrying any firewood he might find lying on the ground in the jungles of the Sanján and Máhim tálukás, during certain months of the last hot season. He is charged with having extorted money from the complainants, C. M. Kále and others, under threats of detaining certain cart-loads of firewood they had collected in the jungles of the Sanján Táluká and were taking to their homes. * * *

"The points for decision are : (1) Did accused put complainants in fear of injury ; (2) did he thereby induce complainants to pay him a sum of money ; (3) did he induce the delivery of this sum of money dishonestly, or did he *bonâ fide* believe himself to be entitled to it.

"The first two points are conclusively proved in the affirmative by the evidence recorded for the prosecution, the fear of injury being caused by threats uttered by the accused (which were, indeed, temporarily put into execution) of detaining complainants' carts. The accused admits having received money from the complainants, as payment of the price of the wood they were carrying away ; but urges that this money was paid by them willingly, so that there was no occasion even for his using threats. He has not brought

1866. Oct. 31. Crim. Review.

forward any evidence, however, that supports this assertion. The complainants and their witnesses, on the other hand, state that their carts were actually detained by the accused, because they declined to pay him; and that he refused to let them go, until they paid him the money he asked for; and there is every reason to believe them, as it cannot be supposed that they would have paid money for wood they knew themselves to be entitled to without payment, except under compulsion.

"Did, then, the accused *bonâ fide* believe himself entitled to exact payment for this wood? His main argument is that, under the terms of his *maktá*, he was vested with a proprietary right over all the firewood lying on the ground in the jungles of the Mahim and Sanjáṇ tálukás during a certain period, within which the wood in question was taken by the complainants; that it was, therefore, his property, and that he was justified in exacting payment for it as such.

"The conditions of sale of the maktá, the agreement passed by accused when the maktá was granted to him, and an order from the Mámlatdár of Sanjáṇ with reference to the accused's right under the maktá, are recorded (exhibits Nos. 23, 17, and 18).

"The fact that the accused was entitled to carry away all or any of the firewood he might find lying in the jungles of Máhim and Sanjáṇ is not to be disputed; but at the same time it is quite clear that, under the provisions of his maktá, he had no proprietary right in any such wood until after he himself, or the men directly employed by him, had removed it out of the jungles. It is expressly laid down in clause 6 of the conditions of sale (exhibit No. 22), and in the agreement (exhibit No. 18), that the accused shall not set up nákás and take fees, or sublet his contract. He was, therefore, debarred from profiting by the removal of any wood, except what he removed himself, or directly by his agents, which, confessedly, the complainants were not. Again, what was the money taken from the complainants by the accused, but a fee? Looking at the transaction in every shape that occurs to the court, it cannot conceive the money paid to be anything but a fee.

1866. Oct. 31. Crim. Review.

"The accused, then, knew that he was not entitled, under his máktá, to take fees, or to profit by wood removed from the jungles by others than himself or his own immediate agents. It follows that, in taking the money in question from the complainants, he caused wrongful gain to himself, and therefore acted dishonestly.

"It may be well to discuss here another branch of the argument put forward by the vakíl for the accused, who, while admitting the complainants' prescriptive right to take firewood from these jungles, urged that, as this right was not secured by any special provision in the conditions of sale, it was superseded during the period for which accused's maktá remained in force. It is nowhere laid down in the conditions of sale, or alleged in the agreement passed by the accused, that the sole right of removing firewood was granted to him. This being the case, and the complainants' prescriptive right to take such wood for household purposes being a matter of notoriety, the maktá granted to the accused must be interpreted in conjunction with those rights. The accused can claim no more than is allowed him by his maktá; and even supposing that he was taken by surprise at finding such rights in existence, his remedy was against the Government, and not in his own hands against the exercise of those rights.

"It does not appear that the accused threatened the complainants with personal violence, or directly with wrongful restraint, so that the accused may properly be convicted of extortion (though his offence very nearly approaches robbery). There is also an element of cheating in his offence; but, as the delivery of the money seems actually to have been caused by the detention of complainants' carts and bullocks, the charge of cheating may well be let go.

"The Court, accordingly, find that A'bdul Kádar valad Bálá A'buji is guilty of the offence specified in the charge, namely, of extortion; and that he has thereby committed an offence punishable under Sec. 384 of the Indian Penal Code; and the Court directs that the said Abdul Kádar be imprisoned with rigorous imprisonment for six months, and pay

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a fine of Rs. 200, or in default be imprisoned with rigorous imprisonment for a further period of one month. Rs. 18 of the fine, if paid, to be awarded to complainants, in repayment of the money extorted from them by the accused."

The conviction and sentence were confirmed, on appeal, by R. H. Pinhey, Session Judge of the Konkaṇ, who, after hearing the prisoner's vakíl, on the 8th of August 1866, recorded the following reasons:—

"I do not consider it necessary to hear the Government Prosecutor in support of the conviction, as I am of opinion that this appeal must be rejected.

"There is an ancient custom according to which rayats are allowed to collect firewood in the Government forests in the Máhim and Sanjáṇ tálukás. The appellant obtained a contract from the Collector, entitling him, for a certain period mentioned in the contract, to collect as much firewood as he could for the purposes of trade. By the terms of this contract, the appellant was entitled to so much wood only as he and his servants could collect; and he was distinctly prohibited from levying fees from the rayats, and from placing nákas (or depôts) in the jungle.

"It, therefore, appears to me that the money levied by the appellant, as deposed to by the witnesses for the prosecution in this case, was already levied by the appellant, illegally and by extortion, as fees."

The prisoner then petitioned the High Court, under Sec. 404 of the Code of Criminal Procedure: praying for a reversal of the conviction and sentence by the Magistrate, and of the order of the Session Judge rejecting his petition of appeal, "for the following (among other) reasons, patent upon the face of the record and proceedings:—That the said conviction and sentence are contrary to law, inasmuch as: (*a*) the Magistrate found that your petitioner had put the complainants in fear of injury; there being no evidence thereof upon the record (*b*). He found that the delivery of the money was dishonestly induced by your petitioner, and that he did not *bonâ fide* believe himself to be entitled to it;

there being no evidence of dishonesty, nor of any circumstances from which it could be inferred. (*c*) While allowing the fact, that the accused was entitled to carry away all the wood he might find lying on the ground in the jungles of Máhim and Sanján, not to be disputed, the Magistrate still held that the accused could not prevent the removal of such wood by others. (*d*) The Magistrate misconstrued exhibit No. 17, inasmuch as he held that by the terms of it your petitioner had no proprietary right in any such wood until after he himself, or the men employed by him, had removed it out of the jungles. (*e*) He misconstrued the said exhibit in holding that the sole right of removing the wood was not thereby granted to your petitioner. (*f*) The Magistrato held the prescriptive right of the rayats to take wood from the jungles to be a matter of notoriety, and, therefore, took judicial notice of it, and imported it into exhibit No. 17, so as to govern its construction. (*g*) He was in error in holding that your petitioner could not sell the firewood which, he had farmed. (*h*) The Session Judge, in appeal, found, without sufficient legal evidence, that there was an ancient custom according to which rayats are allowed to collect wood in the Government forests in the Máhim and Sanján tálukás. (*i*) The Session Judge misconstrued exhibit No 17, in holding that, by the terms of his contract, your petitioner was entitled to collect as much firewood as he could for the purposes of trade, and that the price received by him for timber removed by others was a fee."

The record and proceedings having been called for, the case came on for hearing, this day, before COUCH, C.J., and WARDEN, J.

Reid and *Shántárám Náráyan* for the petitioner.

Dhirajlál Mathurádás, Government Pleader, in support of the conviction.

COUCH, C.J. :—The conviction in this case cannot, we think, be upheld. There was no such fear of injury as is contemplated by Sec. 383 of the Indian Penal Code, in the definition of 'extortion ;' nor was the money given by the

1866. June 1. Crim. Review.

complainants in consequence of any such fear of injury. If the agreement between the prisoner and the Collector had reserved the rights of the villagers, and the prisoner had a right only to take what remained of the firewood, then the villagers would have a right as against him, and the firewood would be their property. What the prisoner in effect said was: "You shall not have the firewood, unless you pay me for it." If the rights of the villagers had been reserved in the agreement, the prisoner might perhaps, under these circumstances, have been guilty of cheating. But the agreement is not drawn up in that way; and the prisoner may have believed in good faith that he had acquired such a right as he put forward. And even though he were wrong in his construction of the agreement, yet, if he supposed that he had the right, he would not have 'dishonestly' induced the delivery of property. The right construction of the agreement appears to us to be, that the Government professed by it to give to the prisoner what they had no right to give without interfering with the rights of the villagers. We, therefore, reverse the conviction and sentence, and the order of the Session Judge rejecting the petition of appeal.

Conviction and sentence reversed.

REG v. GANIA bin BA'PU.

Illegal possession of Opium—Reg. XXI. of 1827—Full Power Magistrate—Jurisdiction—Crim. Proc. Code, Sec. 404.

A conviction and sentence by a Magistrate, F. P., under Reg. XXI. of 1827, Sec. x., cl. 4, annulled for want of jurisdiction; the "Zillah" (*i.e.*, District) Magistrate only being empowered by the Regulation to enforce the penalty.

Nov. 1. Crim. Review.

THE accused was charged, under Reg. XXI. of 1827, Sec. x., cl. 4, as being liable to the penalties enacted for abetting the smuggling of opium, in having in his possession (without being a licensed retailer) above one quarter of a Súrat ser of opium, not shown to have been legally obtained; and was convicted by Dhanjibhái Kávasji, Magistrate F. P.,

at Súrat, and sentenced to forfeit Rs. 151-4-9, or in commutation of the forfeiture to suffer imprisonment for a period of six months. 1866. Nov. 1. Crim. Review.

The conviction and sentence were confirmed on appeal by the Session Judge of Súrat.

The record and proceedings were called for, under Sec. 404 of the Code of Criminal Procedure.

PER CURIAM (COUCH, C.J., and WARDEN, J.) :—The Court annuls the conviction and sentence, and orders the fine, if paid, to be restored ; the Full Power Magistrate not having had jurisdiction, as the "Zillah Magistrate" (that is, the Magistrate of the District) only is empowered to enforce the penalty.

NOTE.—See *Reg.* v. *Sadu valad Pavade, antè*, p. 39.—ED.

REG. v. J. M. DIAZ.

Criminal breach of Trust—Ind. Pen. Code, Sec. 409—Examination of Prisoner—Crim. Proc. Code, Sec. 373—Irregularity.

A conviction and sentence for criminal breach of trust as a public servant, reversed, owing to irregularities in the preliminary inquiries, and irregular procedure as to the examination of the prisoner in the Court of Session.

THE prisoner was convicted, on the 21st of September 1866, of criminal breach of trust as a public servant, under Sec. 409 of the Penal Code, and sentenced to eighteen months' rigorous imprisonment, by A. C. Watt, Acting Assistant Session Judge of Puná. 1866. Dec. 12. Crim. Appeal.

The record and proceedings were sent for (10th October), on hearing the petition of the prisoner.

Howard and *Macpherson*, for the prisoner :—The Assistant Session Judge said to the prisoner, on the 19th of September, before he was examined, "It is optional for you to answer the questions or not; but your refusal to do so will be considered as an admission." This was immediately before putting the questions to the prisoner. The prisoner was examined, in the course of the evidence for the

1866. Dec. 12. Crim. Appeal.

prosecution; and not in accordance with Sec. 373 of the Code of Criminal Procedure. No list was taken of the Jail books; and other persons besides the prisoner had access to the "prisoners' property box" in the interval between possession being taken of it by the Superintendent of the Jail, and its contents being examined. The prisoner had by mistake made entries in wrong books; but those books were not produced by the prosecution.

COUCH, C.J.:—The prisoner was convicted of criminal breach of trust, by the Session Court, in respect of two matters. The first was Rs. 20 and some annas, which it was alleged the prisoner, as Jailer, had received from the Nazír, being the property of a convict then in the Puná Jail. There was conclusive documentary evidence that he had received that sum; and he neither entered it in the books, nor was it found in the property box of the Jail convicts. The prisoner alleged that the item, although not entered in the books brought forward by the prosecution, was entered by mistake in a book which is not now forthcoming; and the prisoner's want of experience as Jailer renders such a supposition not improbable. It is just possible that he may have entered the item in another book, as he alleges; and there is some evidence to support his allegation. It looks somewhat suspicious that such a book should not be forthcoming. It appears from the evidence that the Jailer's books were not at first kept in the proper custody; and that access to them was allowed between the time of the Superintendent of the Jail taking charge of them from the Jailer, and his finally placing them under proper custody. It is much to be regretted that the Superintendent did not act with greater caution in the matter; and that he did not keep the books and the box in his own custody, so as to remove all possibility of other persons having access to them. The circumstance raises a doubt; and perhaps the prisoner may have entered the item as he alleges, and placed the money in the box.

2ndly, There was another charge, with regard to a pair of scales, which it was alleged the prisoner either applied to

his own use, or made a fictitious entry regarding. The prisoner, by the line of defence which he took in the Court of Session, rather injured his case, and excluded the supposition that the entry was made by mistake by those who kept the books. The case is altogether one of such a nature that, had we the power, we should send it down to be re-tried more carefully and minutely. 1866. Dec. 12. Crim. Review.

The Acting Assistant Session Judge, in violation of the provision of Sec. 373 of the Criminal Procedure Code, which distinctly lays down that: "The Court, at the close of the evidence on behalf of the accused person, if any evidence is adduced on his behalf, or otherwise at the close of the case for prosecution, may put any question to the accused person which it may think proper," put certain questions in the middle of the case to the prisoner, with a view to supply the evidence for the prosecution. This was a most serious irregularity in the trial of the case.

Looking at all these circumstances, and the doubts created in our minds as already stated, I am of opinion that the conviction and sentence should be reversed.

NEWTON and WARDEN, JJ., concurred.

REG v. BHA'U' bin VITHU and another.

Disobeying order of Public Servant—Ind. Pen. Code, Sec. 188—*Bombay Act No. V. of* 1864—*Mámlatdár—Jurisdiction.*

Convictions and sentences for disobeying an order duly promulgated by a public servant, reversed; as the Mámlatdár, who stated that he proceeded under Bombay Act No. V. of 1864, was not thereby empowered to make the order.

THE accused were convicted by G. Wilson, Acting Magistrate F. P., in the Sátárá District, under Sec. 188 of the Indian Penal Code, of disobedience to an order duly promulgated by a public servant; and sentenced, respectively, to pay a fine of Rs. 15, or in default to suffer eight days' simple imprisonment. 1867. Jan. 17. Referred Case.

The case was referred for the orders of the Court, under Sec. 434 of the Code of Criminal Procedure, by R. F. Mactier, Session Judge of Sátárá, with the following remarks:—

1867. Jan. 17. Referred Case.

"The question is, was the Mámlatdár competent to make such an order, as he did, under the authority quoted. The order was, 'that, the plaintiff having possession of the premises, the defendant should not allow the water from his house to fall within the plaintiff's premises;' and, as the Mámlatdár states, the order was made under Bombay Act V. of 1864, which gives him authority to decide regarding possession of premises, but not to order a person 'to abstain from a certain act, or to take certain order with certain property in his possession or under his management' (*a*), as mentioned in Sec. 188 (*b*) of the Penal Code."* * * *

PER CURIAM, (NEWTON and TUCKER, JJ.):—The Court reverses the convictions and sentences: as the Mámlatdár was not legally empowered, under Bombay Act V. of 1864, to pass the order which the accused were charged with disobeying.

REG. v. TRIBHUVAN I'SHVAR.

Indian Railway Act (No. XVIII.) of 1854—Reg. XII. of 1827, Secs. 5 and 41—Act XVII. of 1862—Jurisdiction.

By Sec. 35 of the Railway Act, District Police Officers in the Presidency of Bombay could punish, to the extent of the powers conferred upon them, in petty offences, any offence made punishable under the Act, by fine not exceeding Rs. 20.

But Sec. 5 of Reg. XII. of 1827 (authorising the appointment of District Police Officers), and Sec. 41 of the same Regulation (defining the limits of their jurisdiction), being both repealed by Act XVII. of 1862:—

Held that a Subordinate Magistrate had no jurisdiction to impose a fine, under Sec. 17 of the Railway Act.

Feb. 6. Referred Case.

THIS case was referred for the orders of the Court, under Sec. 434 of the Code of Criminal Procedure, by A. A. Borradaile, Acting District Magistrate of Kheḍá.

(*a*) "It shall be lawful for the Mamlutdars' Courts in the Bombay Presidency to give immediate possession, under Section I., Clause 2nd, of Act XVI. of 1838, of all lands, premises, trees, crops, fisheries, and of all profits arising from the same, to any party dispossessed of the same, or of the profits thereof, otherwise than by due course of law, provided application be made to them by such party within six months from the date of such dispossession; and it shall also be lawful for such Courts, in cases in which a disturbance of the possession of lands, premises, trees, crops, or fisheries, is attempted by any party, to issue an injunction to such party to refrain from disturbing the possession of the party who is in possession."—Act V. of 1864, Sec. I.

(*b*) *Vide antè*, p. 34.

1867.
Feb. 6.
Referred Case

The accused was convicted by a Subordinate Magistrate, First Class, of having trespassed upon the B. B. & C. I. Railway; and sentenced to pay a fine of Rs. 4, to be levied, if not paid, by distraint and sale of his property.

PER CURIAM (COUCH, C.J., and NEWTON, J.):—The power of appointing District Police Officers in the Bombay Presidency is given by Reg. XII. of 1827, Sec. 5; but, that section being repealed by Act XVII. of 1862, there is now no power to make that appointment.

Hence it would seem that the powers given to a District Police Officer in the Presidency of Bombay by Sec. 35 of the Railway Act (XVIII. of 1854) no longer exist; and that an offence under that Act can only be tried by one of the persons mentioned in Sec. 34 of the Act, namely, "any Justice of the Peace, Magistrate, Joint Magistrate, or other person lawfully exercising the powers of a Magistrate, or an Assistant to a Magistrate, or Deputy Magistrate."

This view of the law is supported by the fact that the power of punishing, which the District Police Officer had, under Reg. XII. of 1827, has been taken away, by the repeal of Sec. 41 of that Regulation, by Act XVII. of 1862.

This decision will also apply to offences punishable under Secs. 4, 5, 6, and 21 of Act XVIII. of 1854.

It appears to the Court that Act XVIII. of 1854 requires amendment, as a Subordinate Magistrate of any class should have the power to punish for such offences.

The Court, therefore, annuls the conviction and sentence, and directs the fine to be restored; being of opinion that the Subordinate Magistrate, First Class, had no jurisdiction to try the case.

REG. v. LAKSHŪMAN RA'MCHANDRA and others.

Crim. Proc. Code—Trial by Jury—Jurors not sworn.

Held that it was not necessary, in a trial by jury before a Court of Session, under the provisions of the Code of Criminal Procedure, that the jurors should be sworn.

1867. April 3. Crim. Appeal.

THE prisoners, in a trial by jury before the Court of Session at Puná, were found guilty and convicted of forgery, using as genuine a forged document, and abetment of forgery, under Sec. 467, 471, and 107 of the Indian Penal Code; and were sentenced: prisoners Nos. 1 to 5 to suffer rigorous imprisonment for two years, and to pay a fine of Rs. 200, or in default to suffer rigorous imprisonment for a further period of one year; and prisoner No. 6 to suffer rigorous imprisonment for five years, and to pay a fine of Rs. 1,000, or in default to suffer rigorous imprisonment for a further period of one year.

The Session Judge, F. Lloyd, after recording the sentence, remarked that perhaps, if he had been trying the case with the aid of assessors, he would not have convicted them.

The appeal was heard by COUCH, C.J., and WARDEN, J.

Pigot (with him *Pánḍurang Balibhadra*), for the prisoners, contended that the conviction was illegal, as the jurors had not been sworn. The term *jury* implied that the persons composing that body must be sworn. Moreover, there was no evidence in the case to warrant a conviction being recorded against the first five prisoners.

Ganpatráv Bháskar, for the prosecution, observed that there was no provision in the Code of Criminal Procedure (Secs. 322 to 354) which required that jurors should be sworn, any more than assessors.

COUCH, C.J.:—Since the presentation of the appeal in this case we have ascertained from the High Court of Calcutta, that the practice of swearing the jury is not observed in those districts of the Bengal Presidency where the system of trial by jury has been in force, under the provisions of the Code of

Criminal Procedure; and there is nothing in the Code to show that it was intended that the jury should be sworn.

1867. April 3. Crim. Appeal.

It cannot be said that there is no evidence whatever in the case; but we entirely concur with the remarks made by the Session Judge as to the value to be attached to such evidence; and, if it may be of any service to the petitioners, we have no hesitation in saying that we entirely concur with the Session Judge in his observations as to the conviction of the prisoners by the jury.

Petition rejected.

REG. v. IMA'M valad BA'BAN, BA'LA' valad BA'BAN, and JOTI' bin MAHA'DEV.

Accomplice—Corroboration—Practice.

Held that the English practice should be followed as to the amount of corroboration required to support the evidence of an accomplice, which is, that when he speaks as to two or more persons having been concerned in the same offence, his testimony should be confirmed, not only as to the circumstances of the case, but also as to the identity of the prisoners; and that any prisoner as to whom his testimony is not supported should be acquitted.

April 15. Crim. Appeal.

THE prisoners were convicted of murder by R. F. Mactier, Session Judge of Sátárá; and sentenced to death, subject to the confirmation of the High Court, under Sec. 380 of the Code of Criminal Procedure.

The case was heard by COUCH, C.J., and WARDEN, J.

Bhairavanáth Mangesh (with him *Shántárám Náráyaṇ*), for the prisoners, contended that as against Imám the evidence was very weak; and that there was no evidence implicating the prisoners Bálá and Jotí, except the statements of the approver, witness No. 9, Mahádev, and of No. 7, Gaṇu. The evidence of the last was not at all trustworthy, more especially because he stated before the Court of Session that Bálá beat the deceased with a stick, while in his examination before the Magistrate he did not even mention his name as one of the party who attacked the deceased; and also because he stated before the Magistrate that he recognised the prisoners, at the time and place of the murder, by their voice, and he

1867. April 15. Crim. Appeal.

improved this statement before the Court of Session, by saying that he recognised the prisoners by their voices and faces. His evidence, therefore, is untrustworthy; and the statement of Mahádev, being uncorroborated, would not be sufficient for the conviction of Bálá or Jóti.

Dhirajlál Mathurádás, Government Pleader, for the prosecution, contended that Mahádev's statement with regard to the prisoner Imám was fully corroborated; and that, with reference to the others, it was not necessary that the approver's statement should be corroborated in every point. It was sufficient if the approver was corroborated in some points.

COUCH, C.J.:—In this case the whole question turns upon the amount of corroboration necessary to support the testimony of an accomplice. With respect to the prisoner Imám, the testimony of the approver is amply corroborated by witnesses as well as by circumstances; but with respect to the prisoners Bálá and Jotí, his testimony is not supported, except by the evidence of Ganu, which cannot be relied upon: as there are material discrepancies between his statement before the Magistrate and before the Court of Session. The result is that Mahádev's evidence stands uncorroborated as regards Bálá as well as Jotí.

In *Reg.* v. *Stubbs* (*a*), *Jervis*, C. J., says: "My practice in a case like the present is to tell the jury, that, in my opinion, where an accomplice speaks as to three prisoners, and is confirmed only as to two of them, it is safer to require confirmation as to all three, as nothing is more easy than for an accomplice to put the third man in his own place; and that prudence and practice, therefore, require confirmation as to all the prisoners." And *Parke*, B., says: "Throughout the whole of my experience I have uniformly laid down the rule to be as stated by the Chief Justice. It is competent to the jury to find prisoners guilty upon the unsupported evidence of an accomplice; but Judges have always told juries to require confirmation before they do so. Some Judges think,

(*a*) 25 Law J., Mag. Ca. 16; S.C., 1 Jur., N. S., 1115

that if there is confirmation as to one prisoner, that is sufficient. My practice is different, and I tell juries not to find prisoners guilty, unless the accomplice's evidence is confirmed, not only as to facts, but also as to identity." *Wightman* and *Cresswell*, JJ., concurred. 1867. April 15. Crim. Appeal.

This may now be taken to be the established practice in England; and it would certainly be unsafe to depart from it in India. Applying the rule to the present case, neither the conviction of Bálá nor of Jotí can be upheld.

We regret very much that the Judge did not notice the discrepancies in the evidence of so important a witness as Gaṇu. He ought to have asked him to explain the apparent discrepancies between his statement before the Magistrate and before himself.

We, therefore, reject the petition of Imám, and confirm the sentence of death as against him; but with regard to Bálá and Jotí the convictions and sentences must be reversed.

Reg. v. Remedios and others.

Tender of Pardon—Magistrate—Crim. Proc. Code, Sec. 209—Bombay Act No. III. of 1866—Gaming.

On a reference by a Session Judge, where certain persons were found guilty of gaming, by a Full Power Magistrate, solely on the evidence of a person supposed to have been concerned in the offence, whom the Magistrate had pardoned:—

***Held* that a Magistrate has no power to tender a pardon in a case which he tries himself; but only, under Sec. 209 of the Crim. Proc. Code, in the case of an offence triable by the Court of Session.**

THIS case was referred for the orders of the Court by R. H. Pinhey, Session Judge of the Konkaṇ, with the following remarks:— June 12. Referred Case.

"The accused, Francis Remedios and seven others, were entered as having been charged: Nos. 1 to 8 with the offence of gaming in a common gaming-house in the town of Thánú, and No. 7 with the offence of keeping a gaming-house. Nos. 1, 2, 3, 4, 6, and 7 were convicted, and sentenced: Nos. 1, 2, 3, 4, and 6 to pay each a fine of Rs. 20, and in default to undergo one week's rigorous imprisonment [Bom. Act III.

1867. June 12. Referred Case.

of 1866, Sec. 4]; No. 7 to undergo one month's rigorous imprisonment [Bom. Act III. of 1866, Sec. 3]; No. 5 admitted Queen's evidence; and No. 8 acquitted and discharged, by I. Dracup, Magistrate F. P.

"It appeared on the face of the return that the Magistrate had tendered to one of the accused a pardon, and examined him as a witness, and that the said Magistrate had then proceeded to dispose of the case. This procedure was illegal: as Sec. 209 of the Code of Criminal Procedure applies only to cases triable by the Court of Session. In the case of *R.* v. *Megji Premji* (*a*) the High Court ruled that a Magistrate had no power to tender a pardon in a case which he tried himself. In this case the Magistrate convicted the rest of the accused solely on the evidence of the accused, whom he had pardoned, and turned into a witness."

PER CURIAM (COUCH, C.J., NEWTON and WARDEN, JJ.):—The Court reverses the convictions and sentences, and orders the fines, if paid, to be restored: as the Magistrate had no power to tender a pardon in a case to be tried by himself; but only in the case of an offence triable by the Court of Session.

Conviction and sentence reversed.

(*a*) By COUCH and NEWTON, JJ., 13th April 1864.

NOTE.—"It shall be lawful for the Magistrate of the District, or other Officer exercising the powers of a Magistrate, recording his reason for so doing, to tender a pardon to any one or more of the persons supposed to have been directly or indirectly concerned in or privy to any offence specified in Column 7 of the Schedule annexed to this Act as triable by the Court of Session, on condition of his or their making a full, true, and fair disclosure of the whole of the circumstances within his or their knowledge relative to the crime committed, and every other person concerned in the perpetration thereof. If any person shall accept a tender of pardon under this Section, he shall be examined as a witness in the case under the rule applicable to the examination of witnesses. Such person, if not on bail, may, if the Magistrate or other Officer as aforesaid shall think proper, be detained in custody pending the termination of the trial."—*Crim. Proc. Code, Sec.* 209.—ED.

APPENDIX.

Supreme Court—Plea Side.

VI'THOBA' MALHA'RI' v. ARTHUR KING CORFIELD.

False imprisonment—Act XVIII. of 1850—*Master and servant.*

Held that an action of trespass for false imprisonment lay against a magistrate who proceeded without jurisdiction to convict a tailor charged before him under Bombay Rule, Ord., and Reg. I. of 1814 for "misbehaviour as a domestic servant;" there being no information or evidence on oath of the offence charged, as required by the Regulation, as well as by Act II. of 1839; and the plaintiff not being a *domestic* servant, or any servant within the scope of the Regulation, and, when called upon to plead, having stated that he left the service because there were wages due to him from his employer; upon which statement he was convicted without any proper investigation into the truth of it.

Held, also, that a magistrate who failed to act reasonably, carefully, and circumspectly cannot be said to have "*in good faith* believed himself to have jurisdiction," within the meaning of Act XVIII. of 1850; and consequently that he cannot claim the protection of that Act in an action brought against him in a Civil Court.

Where a legislative enactment renders a servant punishable who leaves his employer's service without due warning, a charge, under such an enactment, will not be sustainable, unless it aver not only that the accused left his employer's service without giving the required warning, but also without lawful excuse.

1855.
June 16, 19, 20, 23, 25.

Vithobá Malhári
v.
A. K. Corfield.

THE plaintiff, in this action of trespass for false imprisonment, was a Hindú tailor or dirzi. The defendant was a Justice of the Peace and Senior Magistrate of Police for the Town and Island of Bombay. The plaint laid the damages at Rs. 600. Plea: *Not guilty.*

The plaintiff having allowed a considerable time to pass, after the suit was ripe for hearing, without proceeding to trial, the defendant moved for judgment as in case of nonsuit. The plaintiff accounted for his delay by stating that a sum of Rs. 200 had been paid to his then solicitors, Messrs. Jefferson and Rimington, by a native, as he (plaintiff) had believed on behalf of and by way of compensation from the defendant. Mr. Corfield, however, denied that any such payment was made with his authority or that he was privy to it in any manner whatsoever. Under these circumstances the Court allowed the plaintiff to proceed with his suit.

Westropp and *Reid* for the plaintiff.

William Howard (Officiating Advocate General) and *Lowndes* for the defendant.

The facts, so far as they were of importance, given in evidence on behalf of the plaintiff, at the trial before *Yardley*, C.J., and *Jackson*, J., were as follows:—

The plaintiff had been, in his capacity of dirzi, in the employment of Mr. Meason, then editor of a newspaper in Bombay. During the first six months of that employment the plaintiff worked at his own house, but during the last six weeks of his engagement he attended daily at Mr. Meason's house and worked there during the usual working hours, return-

1855.
June 16, 19, 20, 23, 25.

Vithobá Mathár
v.
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ing to his own house every evening. He earned altogether from Mr. Meason Rs. 113-6, and received a payment of Rs. 21-8 on account, leaving a balance of Rs. 91-14 due to him. On the 12th of June 1854, in the sixth week of his attendance at Mr. Meason's house, the plaintiff, after having made several previous ineffectual demands for payment of the balance due to him, and also on some of those occasions stated that if he were not paid he would quit the service of Mr. Meason, and on one of these occasions been told that he might go if he liked, made a final and urgent demand for payment of that balance. Mr. Meason then threatened to assault the plaintiff, who immediately thereupon left Mr. Meason's service, and on the 7th of July 1854 commenced an action against him in the Court of Small Causes to recover the balance of Rs. 91-14. The summons in that action was served upon Mr. Meason on the 10th of July, and the day fixed for the trial was the 19th of July. Up to the time of the service of that summons, Mr. Meason had not taken any proceedings against the plaintiff. But on the 14th of July he (Meason) caused his wife to write to the Superintendent of Police, whose evidence and the remarks of *Yardley*, C.J., upon the facts mentioned in it were as follows :—

Major Edward Baynes, Superintendent of Police, examined by Mr. *Westropp*.—The plaintiff was never arrested.

Mr. Westropp.—What do you mean by saying the plaintiff was never arrested? Was he not compelled to come to you by a sepoy of police?

Witness.—I mean that there was not any warrant issued for his apprehension. He was brought to me by a sepoy by my direction. I received a note from Mrs. Meason, in which she stated that she had paid up her servant's wages. I have not got the note; I tore it up immediately. It was mentioned in the note that the servant had deserted, in consequence of which I sent a sepoy to fetch the plaintiff to me. He was detained in custody all that night. Next morning I sent him to Mr. Corfield. I did not send any note with him. I sent him with a policeman. I sent him to the Fort Police Office for the convenience of Mr. Meason.

By the Court.—I had no warrant to apprehend him. He was not in custody; he was merely detained in the office. The butler of Mr. Meason who brought the note to me, said that the plaintiff had been paid up his wages. I told the plaintiff, in the presence of the butler, that it was irregular of him to have left Mr. Meason's service without notice.

Yardley, C.J., here remarked that he did not understand Major Baynes's distinction between keeping the plaintiff in custody for a whole night and a day, and merely detaining him in his office without any warrant. His lordship then asked the witness what right he had to keep the plaintiff in custody.

Major Baynes said that he had a note from Mrs. Meason, and the statement of her butler testifying that the plaintiff had left the service without notice.

Yardley, C.J., said that this was not sufficient to justify Major Baynes in keeping the plaintiff in custody.

Cross-examined by the Advocate General.—The plaintiff said that he did not receive his wages regularly.

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On the morning of the 15th of July the plaintiff was sent from the Mazagon Police Office (where he had been detained) by Major Baynes in the custody of a police sepoy to the Fort Police Office, where the plaintiff was brought before Mr. Corfield, the defendant. Neither Mr. nor Mrs. Meason was present. The native butler of Mr. Meason did attend, and presented to Mr. Corfield a note from Mr. Meason. Notice to produce that note at the trial of this action had been given to the defendant, Mr. Corfield. He did not, however, when asked for it at the trial, produce it. What he said with regard to it will be seen in the note of his evidence hereinafter contained. Mr. Corfield stated that he learned from Mr. Meason's butler (who was not put on oath or solemn affirmation) the nature of the charge against the plaintiff. The charge was then, by Mr Corfield's direction, entered in the Police Office record-book by Joseph Machado, a clerk, as follows:—

"1854, July 15th, No. 120.

"*Mr. Meason* v. *Vithobá Malhárí.*

"For misbehaviour as a domestic servant, &c. &c. &c."

Mr. Corfield did not proceed further with the case upon that day, but caused a summons to be served upon the plaintiff, while at the Police Office, to attend there again upon the 18th of July to answer the above charge. The plaintiff was re-conducted by the police sepoy to the Mazagon Police Office, whence he was eventually liberated on bail by Major Baynes on the evening of the same day (July 15th) at 8 P. M.

On the 18th of July the plaintiff attended at the Fort Police Office before Mr. Corfield, pursuant to the summons. Neither Mr. nor Mrs. Meason appeared there. But the native butler of Mr. Meason was present. No oath or solemn affirmation was administered to him, nor was he or any other witness then examined. There was a conflict of evidence at the trial of this action as to the presentation by the plaintiff, on that occasion, in the Police Office, to Mr. Corfield of an English petition. The alleged draft of the petition was produced in evidence. The writer of it (Vásudeo Náráyan) swore to the preparation of it and of a fair copy of it, and that he gave them both to the plaintiff and a friend who accompanied him, who paid half a rupee on behalf of the plaintiff to the writer for his trouble. That friend (Ragunáth Pándurang) corroborated the evidence of the writer. The draft petition was dated 18th of July 1854, addressed to Mr. Corfield, and stated that the prosecution by Mr. Meason in the Police Office "arose from the prosecutor's grudge" against the plaintiff, in consequence of his having sued Mr. Meason in the Court of Small Causes for the balance of wages due by him to the plaintiff. The petition denied that the plaintiff had been guilty of misbehaviour as a domestic servant, and stated that his "reason for giving up the house service" of the prosecutor was the non-payment of the balance of Rs. 91-14 due to him for his wages, and that he held an acknowledgment of that debt in the handwriting of the prosecutor's wife. The plaintiff and five persons (who accompanied him to the Police Office) swore positively that, when placed at the bar before Mr. Corfield on the 18th of July, he (plaintiff) delivered the petition to a sepoy, who gave it to Ráoji Succárám, the Police Office Interpreter, and that he

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opened it and handed it to Mr. Corfield, who looked at it and appeared to read it. The plaintiff also swore that the charge was not read over or explained to him, but that Mr. Corfield said to him that, as he had stayed away without leave, he was sentenced to imprisonment with hard labour for twenty-one days; and that he (plaintiff) then said that he had witnesses in attendance and asked Mr. Corfield to examine them, but he did not accede to that request; that the whole investigation did not last six minutes; and that Mr. Corfield said that, if the plaintiff had any claim for wages, he must go to the Small Cause Court.

From a copy of the record of the conviction produced by the defendant and obtained shortly after the conviction took place, that record appeared to have stood originally as follows:—

"1854, July 15th, No. 120.

"*Mr. Meason* v. *Vithobá Malhárí.*

"For misbehaviour as a domestic servant, &c. &c. &c.

"18th July.

"Defendant admits the charge and states that he has a claim for wages.

"To be imprisoned three weeks with hard labour in the jail."

At the conclusion of the case for the plaintiff his counsel, pursuant to notice, demanded the production of the record-book, containing the record of the conviction. It was produced and put in evidence for the plaintiff, and the record was then found to stand thus—

"1854, July 15th, No. 120.

"*Mr. Meason* v. *Vithobá Malhárí.*

"For misbehaviour as a domestic servant, *in leaving his master's service without warning. Witness, Butler of Mr. M.*

"18th July.

"*Prisoner* admits the charge and states that he has a claim for wages. To be imprisoned three weeks with hard labour in the jail, *and the prisoner is informed he can, if anything is due to him, bring his action in the Small Cause Court.*"

The words in italics were in alteration of, or addition to, the original record.

The issuing of a warrant by the defendant pursuant to the sentence, and the fact that the plaintiff, in accordance therewith, suffered imprisonment in the jail of Bombay for three weeks were admitted by the *Advocate General*

Subsequently the plaintiff obtained a decree in his suit against Mr. Meason in the Court of Small Causes for the balance of Rs. 91-14 and costs.

In stating the plaintiff's case at the trial of this action of trespass for false imprisonment his counsel directed the attention of the Court to Rule, Ordinance and Regulation I. of 1814, relating, as stated in its title, to the decision of "all disputes arising between masters and mistresses and any of their *household servants*, hamáls, or palanquin bearers," and to

"acts of miscarriage and ill-behaviour requiring moderate though immediate correction," of which Regulation the 2nd Article is as follows:— 1855. June 16, 19, 20, 23, 25.

"That it shall and may be lawful to and for any two Justices, *upon application made upon oath* by or on behalf of any master, mistress, or employer, against any servant whatever, touching any misdemeanour or ill-behaviour in such his or her service or employment, or in absenting themselves from their service on a false pretence, to hear, examine, and determine the same, and, on due proof thereof, to punish the offender by commitment to jail of the said town and island of Bombay, there to remain and be kept to hard labour for a reasonable time not exceeding one calendar month, or otherwise by abating some portion of his or her wages, and by discharging such servant from his or their service and employment." *Vithobá Malhári* v. *A. K. Corfield.*

And the 4th Article is as follows:—

"If any servant hired by any master or mistress depart from them before the end of his or her term, unless it be for sound, reasonable, and just cause, to be shown to two of the Justices for the town and island of Bombay, or if any servant at the end of his or her term depart from his master or mistress without seven days' warning, every servant so departing shall, on complaint made thereof by the master or mistress to two of the Justices of the town and island of Bombay, and *on due proof* thereof, be punished at the discretion of the two Justices by a fine not exceeding one month's wages, or by commitment to the jail of the said town and island of Bombay, there to be kept at hard labour for a reasonable time, not exceeding one month, or otherwise by abating some part of his or her wages."

The power given by Regulation I. of 1814 to two Justices is, by Act III. of 1841, conferred upon one Justice.

Counsel for the plaintiff contended that there was not any article in the Regulation of 1814 which authorised the punishment of a dirzi for quitting his employment. That enactment applied only to household servants (such as butlers, cooks, masáls, ayahs, &c.) and to hamáls and palanquin-bearers, who were carefully specified in the preamble, but not to an artizan such as a tailor. The plaintiff had said nothing which amounted to a plea of guilty, but had in his petition put forward a good defence. The 2nd Article of the Regulation expressly stated that the complaint should be made "upon oath;" and though in the 4th Article the words "on oath" do not occur, the meaning of the expression "on due proof thereof" is that the charge or complaint must be made and proved by the master or some one on his behalf, on oath. That there was not any information or statement on oath to support the charge; and that without such an information or statement upon oath Mr. Corfield was wholly without jurisdiction, and had demeaned himself with so much reckless negligence and injustice as to have rendered himself responsible to the plaintiff in the present action of trespass.

The Advocate General began with calling the Court's attention to the circumstance that it was trying an action of *trespass* against a person exercising a judicial office. It was not examining a conviction returned in obedience to a writ of *certiorari*. It was not hearing an appeal from a June 19.

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conviction; nor was the present an action on the case against a Magistrate for acting maliciously in exercising his admitted jurisdiction, but an action of trespass; and the only question before the Court was—"Was the defendant a trespasser? Did he exceed his jurisdiction?" But although that was the only question to be decided, no person with a legal education coming suddenly into Court and listening to the case, would have supposed it; for a whole day had been consumed in adducing evidence apparently with the sole object of colouring the facts and prejudicing the mind of the Court,—evidence not only immaterial, but wholly inadmissible on the issue raised in the pleadings. He had been much surprised at the plaintiff's counsel's opening address. It simply narrated the facts he was instructed he could prove. It did not touch on the law relating to actions against magistrates. In fact, his learned friend could not have done so without disclosing that, as the defendant acted within his jurisdiction, this action was not maintainable. Counsel had not even thought it necessary to excuse the omission of a month's notice of action which should have been given under the Act, or to contend that it was unnecessary. He had been content to confine his observations on the law of the case to a notice of Regulation I. of 1814, without hinting even that his case was, that Mr. Corfield, whilst assuming to act under that Regulation, had in fact acted without jurisdiction to entertain the complaint, or that, if he had, he was without the protection afforded to Justices by Act XVIII. of 1850. Now one of the points by which the defendant was attempted to be made a trespasser was, that a tailor, though serving for monthly wages, was an artizan and not a "servant," and therefore not within the purview of the Regulation under which the plaintiff had been proceeded against; but it was not pretended that this objection, even if it were sound, had been raised before Mr. Corfield when he tried the case. It was an objection now started for the first time. Indeed, so far was the plaintiff from urging it to Mr. Corfield, that in the petition which he says he presented he describes himself as having left the "*house service*" of his master—thus conclusively showing the view he took of his own position. The next objection was, that no evidence had been taken by the Magistrate in support of the charge against the plaintiff, and that he had been convicted on what was improperly regarded as a confession. It was further urged, that a petition had been handed in by the plaintiff to the Magistrate, who had disregarded it. Now, supposing all this to be strictly true, and admitted—nay even, supposing all that the plaintiff's witnesses had stated to be correct, the question would still remain, *Had Mr. Corfield acted within his jurisdiction or not?* If he had done so, he was not a trespasser. The question was not, whether the defendant had been more summary than others might have been—whether the excuse set up by the plaintiff for leaving Mr. Meason's service was, in the opinion of others than the Magistrate, a reasonable excuse, and should have been accepted as such, nor whether the punishment awarded was disproportionate to the offence. He (the *Advocate General*) might admit that Mr. Corfield's proceedings were open to all these questions, and still the plaintiff's case would not be advanced by it; for, as it was not imputed to the defendant that he had acted from improper motives, the case would still remain one in which a honest, though possibly grave, error in judgment had been committed by the Magistrate, in disposing of a case which had come before him in

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the due course of his duty, and which it was his province to adjudicate upon. If the question had been raised before Mr. Corfield, whether the plaintiff was a servant within the meaning of the Regulation, Mr. Corfield would have had to pronounce on that question, and to decide it one way or the other. In like manner, if the statement of the plaintiff at the bar when asked to plead to the charge, amounted, in Mr. Corfield's opinion, to an admission that the plaintiff had left Mr. Meason's service without reasonable cause, the Magistrate was legally justified in so treating it, and in determining that he need make no further enquiry; and, again, it was for Mr. Corfield, and for him only, to decide whether the fact that wages were alleged to be due to the plaintiff was or was not a reasonable excuse. The Court would hear, before the case closed, that complaints against servants for leaving their masters' service without warning were most common, and that the invariable defence was, that wages were due—a defence that must always exist where the servant had remained one day in his master's employ after the last payment of wages; and the police magistrates have found it necessary to decline accepting the excuse that wages are due as a reasonable cause for leaving service. Experience has led them to this resolve, and it is for them, and not for any one else, to determine what is, as distinguished from what is not, a reasonable cause for quitting service. Again, it must be remembered they and they only are the persons legally appointed to determine the amount of punishment to be awarded in such cases; and their experience alone can qualify any one to pronounce a decided opinion whether the punishment they award for these offences is excessive, or whether, from the frequency of this kind of delinquency among servants in Bombay, the proved inutility of mild punishments, and the extreme inconvenience to the European community—so helpless in India when deserted by their servants—it is not necessary, for the sake of example, to award what, abstractedly considered, may appear a very severe punishment. With regard to the record of the conviction of the plaintiff, which had been called for and produced from the Police Office, and the observations which had been made upon it, the *Advocate General* observed, that many charges were daily investigated in the Police Office, and that the convictions and sentences recorded were memoranda not pretending to be legal forms, which time would not allow of. But, however informally the conviction might be set out in the charge-book, it was legal in substance, and contained sufficient matter whereon the magistrate could draw up a formal conviction. Referring to the attempt made by the other side to throw discredit on the Chief Magistrate, by showing that erasures had been made in the record, the *Advocate General* observed that it was not customary for the magistrates to draw up formal convictions unless required for a particular purpose, or called for under a writ of *certiorari*. The plaintiff's counsel objected to call an officer of the Police Court to explain the history of the alteration that had been made in this record, and, by excluding such explanation, had the temporary advantage of asserting, uncontradicted, that Mr. Corfield had "tampered" with his records. The insinuation was groundless and unworthy. A magistrate had a right to amend a conviction, and was competent to supply formal defects in it, up to the last moment, before returning it on a writ of *certiorari*, and he was allowed to do so to protect himself in an action brought against him for acts done in his judicial capacity. It had even

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been contended that after one conviction had been quashed the magistrate might draw up another; and in *Chaney* v. *Payne* (*a*), where precisely this question occurred, Lord *Denman* confirmed the general principle established by former decisions in the following words:—

"The cases of *Rex* v. *Barker* (*b*), *Rex* v. *Allen* (*c*), *Basten* v. *Carew* (*d*) and *Rex* v. *the Justices of Huntingdon* (*e*) establish clearly that magistrates are not bound by the conviction first drawn up, whether it be merely a note of the conviction or drawn up in a formal manner as the conviction itself; but that they are at liberty, when called upon by appeal to return the conviction to the Quarter Sessions, or by *certiorari* into this Court, to draw up and return a more formal conviction, correcting any errors which may have existed in that first drawn up, provided the latter conviction be according to the truth and the facts of the case as proved before the magistrate."

The Advocate General would further observe, that the alleged "tampering" took place two or three days ago, and by his recommendation. In the original record the charge was simply "misbehaviour," and he had suggested that it would be only proper to add in what that misbehaviour consisted, which was the leaving his master's service without the requisite warning. As his learned friend had put in the conviction as part of his case, he was bound by it. The learned counsel then drew the attention of the Court to the law, that a conviction by a magistrate in a case where he had jurisdiction, not void on the face of it, was conclusive as to the facts therein recorded. No legal proposition was more firmly established or had been more often recognised, since the case of *Brittain* v. *Kinnaird* (*f*), where it was held that the finding of a magistrate (in a case in which he had jurisdiction) that a decked vessel of 13 tons was a "Boat," and therefore liable to seizure under the Bumboat Act, was conclusive of the fact in an action of trespass against the magistrate for the seizure. *Dallas*, C.J., in that case, said in the course of his judgment:—

"The general principle is perfectly clear, that a conviction by a magistrate who has jurisdiction over the subject matter is, if no defects appear on the face of it, conclusive evidence of the facts stated in it. Much has been said of the danger of magistrates giving themselves jurisdiction, and extreme cases have been put as of a magistrate seizing a ship of 74 guns and calling it a boat. Suppose such a thing done, *the conviction is still conclusive, and we cannot travel out of it.*" *Park*, J., in the same case said:—"All the cases from Hardress downward concur in one uniform principle, that where a magistrate has jurisdiction, a conviction by him is conclusive evidence of the facts stated in that conviction." And *Burrough*, J.:—"Since I have been in Westminster Hall it has never been doubted that where a magistrate has jurisdiction, a conviction, having no defects on the face of it, is conclusive evidence of the facts which it alleges." And *Richardson*, J.:—"Suppose the case of a conviction under the Game Laws for having partridges in his possession,—could the magistrate in an action of trespass be called on to show that the bird in question was really a partridge? And yet it might as well be urged

(*a*) 1 Q. B. 722. (*b*) 1 East. 186. (*c*) 15 East. 333. (*d*) 3 B. & C. 649.
(*e*) 5 D. & R. 588. (*f*) 1 Brod. & Bing. 432, 438.

in that case that the magistrate had no jurisdiction unless the bird was a partridge, as it may be urged in the present case that he has none unless the machine be a boat."

In a very recent case of *Cave* v. *Mountain* (*g*), also a leading authority, and which was an action of trespass against a magistrate, on the ground that he had caused the plaintiff to be imprisoned as a felon on mere hearsay evidence, *Tindal*, C.J., said:—"That the information does not disclose any *legal* evidence of the guilt of the prisoner is undoubtedly true. But at the utmost this amounts to no more than an error of judgment on the part of the magistrate, and no case can be found in which a magistrate acting within his jurisdiction has been held liable in an action of trespass for a mere error in judgment (*h*). It would be a very different case if the defendant had acted from any malicious or improper motive, or with any want of *bona fides*; in which case he would *be liable in a different form of action*."

In *Brittain* v. *Kinnaird* the Chief Justice observed that a magistrate, even in the case supposed, is not liable to a civil action, and can only be proceeded against criminally. However, if liable to be sued at all, it is, as Chief Justice *Tindal* observed, in a very different form of action, and not in trespass. The court, then, in the present action could not re-open the question of fact, not being a court of appeal from the magistrate's decision. But the *Advocate General* had no wish to decline a discussion on the merits. He would prove that the usual course was taken in this, as in the very numerous similar cases of complaint against servants for leaving without notice, which constantly come on for adjudication before the Police Office. It would be proved that the prisoner having been put at the bar, the charge was explained and interpreted to him, that he replied that it was true that he had left his master's service, but that wages were due to him. Mr. Corfield then informed him that if wages were due, he should sue for them in the Small Cause Court. Mr. Corfield then sentenced him to three weeks' imprisonment with hard labour. It was denied on the part of the police that any petition had been presented by the plaintiff to Mr. Corfield. The clerk who enters the charge, the interpreter, two havildárs and a sepoy present on duty on the occasion, were prepared to disprove this. But even if they were in error, even if the petition had been presented, it contained nothing beyond what the plaintiff had orally stated at the bar of the Police Court, viz. that he had left his master's service on the plea that wages were due to him, (unless, indeed, the petition may be said to have put the nature of that service, "house service," beyond a doubt). Not a word appeared in the petition of the matter mentioned by counsel regarding Mr. Meason's threatening to assault the plaintiff for demanding his wages.* It merely set up as an excuse that wages were due; but, as observed, it was within Mr. Corfield's jurisdiction to pronounce whether that was a good ground of defence; and, if he were not satisfied with it as such, he was perfectly at liberty to pronounce the sentence he did. The merits of the decision, *as such*, were not matters for this Court to adjudicate upon. It was not a

(*g*) 1 M. & G. 263. (*h*) See 1 East. 563 *n*.

* NOTE.—That fact was sworn to by the plaintiff and one of his witnesses.

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court of appeal from magisterial decisions. If Mr. Corfield acted within his jurisdiction, it was not competent for this Court to sit in judgment upon him.

Yardley, C.J.—Suppose an artist were engaged to paint a portrait, and attended at a house for that purpose, and a magistrate chose to consider him a domestic servant, would his conviction be binding in an action against the magistrate?

The Advocate General replied that the question put was disposed of by *Brittain* v. *Kinnaird*. Where there was an erroneous decision by a magistrate, the proper course was to move for a writ of *certiorari*, or to appeal, if an appeal were allowed, to set it aside. The conviction, so long as it stands, is decisive of the facts therein stated. If a magistrate were so dishonest as to convict an artist under the circumstances supposed, he would be liable to be proceeded against criminally.

Yardley, C.J., remarked that it was contended on the part of the plaintiff that sleeping on the premises constituted a domestic servant, a circumstance in itself which his lordship did not think of much weight; but, in his opinion, a domestic servant was one who was engaged for the performance of ordinary household work; and he entertained great doubt if a tailor was a domestic servant.

Jackson, J., said that a servant was one hired for a regular period, and whose whole time was at his master's disposal.

The Advocate General repeated that Mr. Corfield was the sole judge to decide, when a complaint under the Regulations was brought before him, whether a given individual was or was not a servant within the meaning of the Regulation. If he decided erroneously, he was not liable to an action of trespass. Moreover, the law was clear that, until his conviction was upset, the record stating that fact was conclusive evidence that the plaintiff was a domestic servant. The evidence adduced by the plaintiff is wholly inadmissible against the conviction. But although the question whether the plaintiff was a servant under the Regulation was wholly immaterial, he would submit that Mr. Corfield's view of the matter was correct, for the Regulation did not particularise any description of servant. But he again reminded the Court that malice or improper motives were not imputed to Mr. Corfield; and if, therefore, he had acted erroneously and without jurisdiction, he was within the protection of Act XVIII. of 1850.

20. The Court having risen for the day, the *Advocate General* on the following morning called the Court's attention to *Mould* v. *Williams* (*i*), *The Queen* v. *Bolton* (*j*), and *Lowther* v. *Earl Radnor* (*k*).

Joseph Machado, examined by Mr. Lowndes.—I am a clerk in the Fort Police Office, in charge of the summons department. It is my duty to issue summonses, and superintend service thereof. I also call out the names of the parties. I remember the case of Vithobá Malhári being filed on the 15th of July last. I issued a summons returnable on the 18th. The charge was "misbehaviour as a domestic servant, in leaving service, &c. &c. &c.." The three *et ceteras* have been scratched out by my assistant. I saw him do it. The words "leaving his master's service without warning" were added a few days ago by desire of the Senior Magis-

(*i*) 5 Q. B. 469. (*j*) 1 Q. B. 66. (*k*) 8 East. 113.

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trate, Mr. Corfield. The other part of the charge was not in my handwriting. The plaintiff was served with summons on the 15th in the office. On the 18th I saw the plaintiff in the office, at the bar. I called out his name, as well as Mr. Meason's. The butler of Mr. Meason appeared; the charge was read over and interpreted to the prisoner by the interpreter. This book was before Mr. Corfield at the time. Viṭhobá said that he left the service because his wages were not paid up. Mr. Corfield said to him that if anything were due to him, he might bring an action against his master in the Small Cause Court. The butler said that no wages were due to the prisoner. The butler was in the witness-box. I did not see any friend beside the prisoner. It is usual to order out witnesses when the case in which they are concerned is called. No paper or any writing was given by the plaintiff to the Magistrate; if there were, I would have seen it. I did not hear Viṭhobá ask Mr. Corfield to hear his witnesses, or anything to that effect. I did not hear him say that he had any witnesses.

Cross-examined by Mr. Westropp.—The friends of the prisoner might be in the court, but I did not know them. At the beginning of every case we call out to the witnesses to go out of hearing. I remember a havildár calling out to the witnesses to go out of hearing. I remember this case because no petition was presented. Since this action commenced, I told Ráojí all I knew about this case. People were talking about some petition being presented to Mr. Corfield in this matter; I told Ráojí that no petition was given to him. I will not swear positively that no petition was presented; I do not recollect to have seen any petition presented. I believe, but I am not positive, that Ráojí asked Viṭhobá if he had any witnesses. Mr. Meason's butler was not sworn, because the plaintiff pleaded guilty. I don't recollect if the butler was asked why his master did not attend. The summons was not paid for, because I thought the case would be entered in the "morning sheets." The complainant was not charged for the summons. I have been in the Police Office for eight or nine years. No note was produced by Mr. Meason's servant. I can't say whether there may have been a note sent to Mr. Corfield. I served the summons on Viṭhobá by desire of Mr. Corfield in the Police Office. I framed the charge upon the inquiries I made of the butler. The butler was sent to me by Mr. Corfield. The butler said the tailor left his master's service without permission.

By the Court.—I don't recollect if Mr. Corfield asked Viṭhobá in what capacity he served Mr. Meason.

By Mr. Westropp.—My salary is Rs. 25 a month. The appearance and dress of the plaintiff would not have particularly led me to believe him a tailor. He looked like a butler. He did not look like a cook.

Re-examined.—The cases in the "morning sheets" are of a trivial nature, and are not charged. This case was not in the morning sheet.

Ráojí Succárám, examined by the Advocate General.—I am interpreter to the Senior Magistrate; my duty is to interpret the charge to the prisoner, and he is called on to plead. I recollect the case of Viṭhobá being investigated by Mr. Corfield. The name of the complainant, Mr. Meason, was called out, when his butler, a Portuguese, came forward. The prisoner said he left the service because his master would not pay his wages. Mr. Corfield said to him that he was liable to one month's

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imprisonment, but he was sentenced to three weeks' hard labour, and referred to the Small Cause Court for his wages. I did not see any petition given to Mr. Corfield. If any petition were presented, I would have seen it. When a case is called on, the witnesses are ordered out of hearing. The usual notice was, I believe, given when this case was called on. I am not aware of Viṭhobá having brought any witnesses. I am sure Viṭhobá did not ask Mr. Corfield to examine his witnesses.

Cross-examined by Mr. Westropp.—I obtained the benefit of the Insolvent Act about a year ago. My liabilities amounted to about a lakh and a half, and my assets fifty thousand. I had a conversation with the last witness about this case on a few occasions. Viṭhobá was not asked if he had any witnesses. He was not asked if he had proof that wages were due to him; nor was he asked if he had any excuse for leaving his master's service; nor in what capacity he served; nor who his master was. Viṭhobá might have fifty friends in the court at the time without my knowing them. It is usual that cases of a trivial nature are entered in the morning sheets, and are not paid for. Nothing was said about the time when he left the service. This charge was first written by the last witness; the other alterations were made subsequently by different clerks by desire of Mr. Corfield. I don't recollect when the words "witness, the butler of Mr. M." were written. I saw the entry of the conviction in the Police Office book for the first time three or four days after the day of the trial before Mr. Corfield. That part of the entry containing the words "and the prisoner is informed he can, if anything is due to him, bring his action in the Small Cause Court," was not then in the book. It was made afterwards by Mr. Corfield, but I do not know at what time.

Counsel.—What particular reason have you for recollecting that no petition was presented to Mr. Corfield by Viṭhobá?

Witness.—Some time after the case occurred, discussion arose about it in the newspapers and elsewhere. I will not swear positively that the petition was not presented. I do not recollect its having been presented.

By the Court.—In the discussions which arose on the subject there was a question that a petition was presented, which struck me, because no petition was presented to Mr. Corfield; this was not a prominent part of the subject.

By Mr. Westropp.—The butler said that there were no wages due to Viṭhobá. The butler was not sworn. The Magistrate took down what the prisoner said; but I don't know if he took down what the butler said. The prisoner did not say what he was. I could not say from his appearance what he was. He appeared like a domestic servant. I do not think he looked like a butler; he certainly was not a cook, nor a hamál. No question was asked why his master did not attend. He did not say he was guilty, but said he left the service because his wages were not paid up.

Pándú Rágoji, a havildár, doing duty at the Fort Police Office, stated.—I was present when Viṭhobá Malhárí was put up at the bar on the 18th of July. I was standing near the Magistrate when he was disposing of the complaint cases. I was on duty at the time; another havildár, Shamsúdín, was on the opposite side. When Viṭhobá was put at the bar, the charge of having left his master's service without warning was communicated to him, and he was asked if he had done so; he replied that it was so; he gave no reason for his conduct. He was then sentenced

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to twenty-one days' imprisonment. The Magistrate told him that if any wages were due to him he ought to apply to the Small Cause Court. This was in reply to a statement from Vithobá that wages were due to him. This he said before sentence was pronounced against him. I did not see any petition presented by Vithobá to the Magistrate. I was standing close to him, and if he had anything to hand up he would have done so through me. When Vithobá was being removed from the Police Office he asked me to take him up before the Magistrate, as he wished to make a statement, but this I told him I could not do. There were no friends of his present when I removed him from the bar; he wished me to convey a message to his house that he had been sentenced to twenty-one days' imprisonment. This was at 5 o'clock in the evening.

Cross-examined by Mr. Westropp.—I serve in the Police Office; petitions are presented very often in the Police Office. Vithobá did not say that wages were due to him as a dirzi; he said "Wages are due to me for this month as a dirzi." I did not observe to whom he gave his umbrella when he was put at the bar. He might have had fifty friends in court without my knowing it.

Shamsúdín Abdúl Káder, a havildár of police, and *Rámchandra Sadáseo*, also a policeman, were sworn, and tendered by the defendant's counsel for cross-examination by the plaintiff's counsel, which the latter declined.

Mr. A. K. Corfield, examined by the Advocate General.—I am the defendant in this action; I have been Senior Magistrate for the last three years and a half. I remember receiving a note from Mr. Meason. I don't know what became of it. He said in it that he was quite ready to attend whenever required. The case was investigated on the 18th of July last in the usual manner.

Cross-examined by Mr. Westropp.—I did not ask the plaintiff in what capacity he served. I did not ask him whether he left the service in the middle or beginning of the month. I knew he was a tailor in Mr. Meason's employ. I did not ask him what excuse he had for leaving the service. The charge having been interpreted and explained to him, I took down his answer as it was interpreted to me. He said he had wages due to him by his master, and therefore he left his service. He might have said a great deal more, if he had anything to say. The plea of wages is generally set up in defence by servants in such cases. I take upon myself to state that witnesses were ordered out when this case was called on. This is invariably the practice; if any witness remained in court after the usual notice, I have invariably refused to take his evidence. The story of a petition being presented to me is entirely false, to the best of my recollection. I would not swear positively to this, as it occurred nearly a year ago. [Here followed some cross-examination of Mr. Corfield as to his memory, which it is unnecessary to detail. His attention was then called to the Police Office record of the conviction, as it appeared in the book.] To the best of my recollection the part in this record regarding the plaintiff being referred to the Small Cause Court was written at the time the case was investigated. The butler of Mr. Meason was in the witness-box when I wrote "Witness, butler of Mr. M." in this record. The butler was not sworn; it was not necessary, as the plaintiff had admitted the charge. By the charge being admitted, I mean what he said when it was interpreted to him—namely, that he left the service without

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his master's permission. The charges on which persons are brought up are not fully entered in the book, but they are fully interpreted to them when they are called on to plead. I understand the Hindustání and Maráthí languages. I understood his answer before it was interpreted to me. It was not by my desire that the plaintiff was sent back to Major Bayues.

Re-examined.—In a great many cases the plea of wages is invariably set up in defence by servants.

By the Court.—The charge was not supported by anybody's oath. I had received no note from Mr. Meason before the summons was issued. His butler first informed me of the charge against the plaintiff. I had no communication with Mr. Meason on the subject except his note to me, stating that he would attend whenever called.

This closed the defendant's case.

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The Advocate General asked leave to put in a formally drawn-up conviction.

Mr. Westropp objected to allow this at the eleventh hour, the defendant having closed his case.

Yardley, C.J., said that it was too late now, after the defendant's case had been closed, to permit him to put in the proposed formal record of the conviction, and that the Court would not strain a point in favour of a technical defence.

Mr. Westropp, for the plaintiff, then proceeded with his general reply, and said that his learned friend the *Advocate General*, on behalf of the defendant, had observed that the plaintiff's counsel had judiciously passed over the legal difficulties in his case; and he (the *Advocate General*) named, as the first obstacle, the want of proof of one month's notice to the defendant, previously to the commencement of the action, of the plaintiff's intention to institute it, as required by the Statute 24 Geo II. c. 44; but the *Advocate General* gracefully waived that objection, for which he was entitled to due credit, as the objection, though formal, might have proved a serious one if the Court refused permission to the plaintiff to prove the service of the notice after his case had been closed. The fact of its having been served had not come to the knowledge of the plaintiff's present professional advisers until after the *Advocate General's* speech. He (Mr. *Westropp*) had intended to argue that the notice was unnecessary. True, there were two decisions to the contrary in the Supreme Court at Calcutta, *Griffin* v. *Deatker* (*l*) and *Harrowell* v. *Trower* (*m*); but in neither of the reports of those cases are there any reasons given for the decision; and the Statute had certainly not been extended in direct terms to India. The *Advocate General* had, however, relied on the conclusiveness of the conviction, and said that if it were regular upon the face of it, and alleged facts showing a sufficient jurisdiction in Mr. Corfield to entertain the case, it was a bar to an action of trespass, and must be treated as incontrovertible verity. In support of this proposition the *Advocate General* had led the Court over a wide field of decisions, through which he (Mr. *Westropp*) had no intention of following him. He would only name two cases, to show that if a Justice of the Peace falsely assumed jurisdiction, the Court would not allow his conviction to operate as a bar. One was an old case, *Terry* v. *Huntington* (*n*), in which Chief Justice *Hale* said

(*l*) Morton Rep. 360. (*m*) Clarke's Addl. Rules p. 54.
(*n*) Hardress R. 480.

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that the judgment is no estoppel if the matter be not within the limited jurisdiction of the party pronouncing it, and that if the limited jurisdiction be exceeded, that does not take away from the jurisdiction of the superior courts. The other case, *Welsh* v. *Nash* (o), is more modern. Lord *Ellenborough* there said that the Justices cannot make facts by their determination in order to give to themselves jurisdiction contrary to the truth of the case. The Justices had there declared an old road which had been widened to be a new road. Mr. Justice *Lawrence* observed that the Justices cannot give themselves jurisdiction in a particular case by finding that as a fact which is not the fact. Here the conviction is said to have found that Vithobá Malhárí was a domestic servant, and as such left his employment without warning, and that he admitted such to be the case; all of which was contrary to the fact. But supposing the *Advocate General's* proposition to be true, that a conviction apparently regular and valid, and within the jurisdiction of the Justice, was conclusive in an action of trespass brought against him by the party convicted, then the question arose, Did this conviction fall within that description? So far from such being the case, it was remarkable for the absence of every requisite form which a conviction should possess. A conviction should be under the hand and seal of the magistrate; that being the only mode of authenticating it as a record.

Yardley, J.:—That is an error of a kind which if it stood alone we should allow to be amended.

Mr. Westropp placed no particular stress upon that omission, but named it as one amongst many. The others were, that the places where the complaint was made and the offence committed were not specified, as is necessary, in order to show that the Magistrate was acting within his jurisdiction. The omission of the name and style of Mr. Corfield, and that he was a Justice of the Peace for the town and island of Bombay; the omission of the name of the informer, and of the time when the offence was committed; the omission to state the summons; were all fatal defects in the form of the conviction, as shown by Mr. Paley in his work on Convictions. But it was also defective in substance. When he (Mr. *Westropp*) opened the plaintiff's case, he treated the conviction as resting upon the 2nd Article of Rule, Ordinance, and Regulation I. of 1814, because, according to the copy of the conviction in the plaintiff's possession, it was for "misbehaviour as a domestic servant" only. Since that copy was obtained, the conviction had been altered by adding the words "in leaving his master's service without warning." Those words, it seems, were added by the advice of the *Advocate General*, a fact which for the first time came to the knowledge of the plaintiff's present advisers during the speech of the *Advocate General*. But there are other alterations which he did not advise, and which should be referred to before he (Mr. *Westropp*) concluded his reply. The alteration made on the advice of the *Advocate General* was an attempt to bring the conviction under the protection of the 4th Article of the Rule, Ordinance, and Regulation I. of 1814; but the result was to make it more unsustainable even than it was before. That Article created two offences: one was—"If any servant hired by any master or mistress depart from them before the end of his term, unless it be for some reasonable and just cause;" the second was—"or if any servant, at the end of his term, depart from his master or mistress without seven days' warning." The conviction was uncertain,

(o) 8 East. 340.

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because it did not allege whether the departure of Vithobá Malhárí was "before the end of his term," or "at the end of his term;" therefore the offence charged was not brought within the terms of the enactment. The second fatal defect in point of substance was, that the departure of Vithobá from his employment was not stated in the conviction to be without reasonable or just cause. In Seth Turner's Case (*p*) a conviction of a miner, because "he absented himself from his said service, and did thereby then and there neglect to fulfil the same, contrary to the form of the Statute," was held to be bad for that omission. It is particularly to be remarked, that the Statute in that case said nothing about just or reasonable excuse for absence. But Lord *Denman*, Chief Justice, said—"It is essential that there should be on the face of the information something on which the Justices may convict. Now to complain merely that the party absented himself from his service, is to charge no offence, unless it be added that this was done without leave or lawful excuse." And *Patteson*, J., said—"It therefore comes to this; whether it is necessary to negative lawful excuse. I think it is, and that the absence must be shown to be wilful or without lawful excuse. As the information is framed, it would have been proved by showing that the prisoner had stayed away because he had broken his leg."

The charge, moreover, should have been made upon oath: Paley, 3rd Ed., pages 32, 44; Act of the Legislative Council, II. of 1839, within which this case is brought by Act III. of 1841, and Rule, Ord., and Reg. I. of 1814, Articles 2 & 4. Without an information upon oath the Magistrate is wholly without jurisdiction. He (Mr. *Westropp*) then said that these authorities proved that it was utterly hopeless for Mr. Corfield to attempt to shelter himself behind a conviction so radically defective both in form and substance. The very passage cited by the *Advocate General* from the judgment of *Burrough*, J., in *Brittain* v. *Kinnaird* admitted that the conviction, in order to be conclusive, must be free from defects on the face of it. And *Chaney* v. *Payne*, also cited for the defendant, showed that an action of trespass for false imprisonment may be successfully maintained where the conviction is informal, or invalid on its face. What, then, were the facts of the case, stripped of all technicalities? Mr. Meason, being deeply indebted to his tailor, resents being asked for payment, and offers violence. The tailor remonstrates, and threatens to quit the service. Mr. Meason says, "Very well, go." Mr. Meason was probably but too happy to rid himself of a dunning creditor; but the tailor brings his action in the Small Cause Court for his wages. The hearing of that suit being imminent, Mr. Meason writes to Major Baynes, and causes him to arrest the tailor. Now the evidence of Major Baynes, it must in fairness be admitted, exonerates Mr. Corfield from all complicity in that arrest, however illegal and improper. But Mr. Meason also writes to Mr. Corfield, who afterwards caused the dirzi to be summoned before him. For what occurred on the trial in the Police Office only can Mr. Corfield be held responsible. Even assuming his recollection of the case to be perfect, and the story of his own witnesses to be true, there is amply sufficient to condemn him. The charge is said to have been read over and interpreted to the plaintiff, and the mystical three *et ceteras* fully expounded. He was then asked what he had got to

(*p*) 9 Q. B. p. 91, and see *Ex parte Geswood*, 17 Jur. 1163.

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wages due to me." The butler of Mr. Meason, the nameless informer in the record of the conviction, no doubt fully primed by his master, denied that any wages were due; but he was not put upon oath, and it was, to say the least, taking a very great liberty with truth, to describe that butler as a witness—a description introduced by way of amendment, and most certainly not by the advice of the *Advocate General*. Mr. Corfield thinks proper to enter the statement of Vithobá as an admission of guilt in his book, and forthwith sentences him to three weeks' imprisonment with hard labour. Now Vithobá's statement was in truth a plea of not guilty, and not a plea of guilty; and no opportunity was afforded to him of establishing his defence, the truth of which was afterwards proved in the Small Cause Court. The *Advocate General*, indeed, gravely asserts that the non-payment of wages being the usual defence, is uniformly and properly disregarded at the Police Office. He (Mr. *Westropp*) would be greatly astonished to hear the latter branch of that proposition affirmed by this Court. Were that good law it would decide that, even though the master should break his part of the contract, the servant would still remain bound to perform his part,—truly one-sided justice. The preamble of the Regulation of 1814 shows that such a defence is clearly within the policy of that enactment. But look at the case as proved by the plaintiff's witnesses, not one of whom wavered in his testimony, even when subjected to the rigorous and searching cross-examination of the able counsel for Mr. Corfield. They have clearly established the preparation of the petition, which states that the prosecution was instituted by Mr. Meason because the plaintiff had sued him for his wages in the Small Cause Court. What was more natural than that Vithobá should cause that statement of his defence to be prepared in the interval between the service of the summons upon him and his defence on the following Monday in the Police Office? The person who suggested and paid for the petition; the person who prepared it; the friends who saw Vithobá bring it to the door of the Police Office; and those four who saw him eventually present it have clearly and fully proved those facts. Who are most likely to have a vivid and abiding impression of the presentation of a petition? Not the judge and the officials of a court where many such papers are weekly presented or offered in evidence. Could your lordships—could the counsel or solicitors—could the interpreters venture to swear to the papers put in evidence in any suit a twelve-month ago in this court, unless there was some note or very particular reason for recollecting them? Routine blunts the powers of observation. Is not the man whose case was on trial, and are not the friends who accompanied him, and whose visit to the Police Office was probably an isolated one, much more likely to recollect truly and exactly the occurrences on that day? Not one of the witnesses on behalf of Mr. Corfield ventured to swear positively that the petition was not presented to him. He (Mr. *Westropp*) must except the police havildár, but would not trouble the Court with any comments upon his evidence, which was not in the slightest degree trustworthy. He (Mr. *W.*) would have paid as little regard to the evidence of the platoon of policemen whom his learned friend, the *Advocate General*, had paraded in the box, but upon whom the counsel for the plaintiff did not bestow a question. Neither José Machado nor Ráojí Succárám, the Interpreter, venture to swear positively that the petition was not presented to Mr. Corfield, but only that they did not recollect its having been presented.

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Their obvious bias was ludicrously manifested. Machado would fain induce the Court to believe that Vithobá the tailor resembled a butler, although admitting that he was a Hindú, and dressed as such, and that he, Machado, had never seen a Hindú in the capacity of butler. Ráojí, the Interpreter, did not confirm the resemblance to the butler, nor did he see any resemblance in the plaintiff to a cook or a hamál, nor to anybody in particular except "a domestic servant." These two worthies were thus anxious to bring the unlucky tailor within the words of Rule, Ordinance, and Regulation I. of 1814, in appearance at least. What trust can the Court repose in the testimony of these witnesses, who daily tremble in the presence of Mr. Corfield, whose very means of existence depend upon his supreme will and pleasure, and whose chief and guiding rule of conduct is a lively sense of his future favours? Mr. Corfield himself did not venture to affirm positively upon oath that the petition was not presented to him. He did, indeed, say that he believed the story of its presentation to be a pure fabrication. But there is a circumstance in this case which proves beyond question how fallacious is the memory of that gentleman. In the entry of the conviction in the Police Office book, after the words "To be imprisoned three weeks with hard labour in the jail," occur, plainly in a differently-coloured ink, the words "and the prisoner is informed he can, if anything is due to him, bring his action in the Small Cause Court," another addition for which the learned *Advocate General* was not in anywise responsible. Now Mr. Corfield has sworn that he did not exactly know when they were written, but to the best of his recollection the latter words were written at the same time upon which the former words were written, namely, the day on which he tried and sentenced the plaintiff. But Ráojí, the Interpreter, admitted having seen the book four or five days after the trial, and that the latter words were not then in it; and of this he spoke with certainty, and is completely borne out by the aspect of the book. Ráojí also said that he knew not when that entry was made. He (Mr. *Westropp*) would not speculate much upon what was the reason of the subsequent introduction of those latter words by Mr. Corfield. He may have then had a lingering recollection of the statement in the petition as to Mr. Meason's motives for the prosecution of the dirzi. It may have occurred to him that the case had been carelessly disposed of, and that some precautionary measures were necessary in order to make things look a little more square. Strange it was that Mr. Corfield should have now forgotten the making of this manifest addition for some particular purpose. His lapse of memory on such a point at all events proves to demonstration the utter worthlessness of all his recollections in the case. What trust could be placed in them after such an example of obliviousness as this?

It is clear that a dirzi or tailor does not fall within the description of servants contemplated by the Regulation of 1814. Household servants are those named in the preamble, and the expression "any servant" used in Article 4 must mean any servant of that description: *Kitchen* v. *Shaw* (*q*). A tailor is an artizan, not in any sense a servant. Is any person who contracts to perform work during a certain number of hours in the day to be considered a servant? Is a visiting governess or is a tutor a servant? There has been, it is said, an instance of an eminent

(*q*) 6 Ad. & E. 729.

sculptor being employed at a yearly salary by a noble lord; could the sculptor be denominated or punished as a servant? A fair test as to the existence of the relation of master and servant here is—whether or not the plaintiff was bound to give up his whole time to Mr. Meason. It is evident that such was not the case. The plaintiff, after leaving Mr. Meason's house every evening, might have worked for any person who pleased to employ him.

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The errors of Mr. Corfield in this case are inexcusable, and are therefore not cured by Act XVIII. of 1850, which only protects excusable errors: *Lang* v. *Gubbins*, reported in the note to the case *In re Foy*, in 1 Taylor and Bell's Reports (*r*). The same doctrine prevailed in *Calder* v. *Halket* (*s*). If ever there were a case of culpable negligence, this is one. The non-attendance of Mr. Meason as a witness, and the petition of Vithobá, ought to have rendered Mr. Corfield doubly vigilant. Instead of being so, he records as a confession that which is no confession; he accepts, as a contradiction of Vithobá's statements that wages were due to him, the unsworn testimony of Mr. Meason's butler; he does not ask whether Vithobá had any witnesses; he never asks how long it is since Vithobá had left his employment. He finally, without having any jurisdiction over him as a tailor, convicts him of an act for which he had every reasonable justification, an act constituting no offence at law, and sentences him to three weeks' imprisonment with hard labour. Mr. Corfield having thus by his careless disregard of law suffered himself to become minister of the vengeance and dishonesty of Mr. Meason, cannot be permitted to say that he acted *bonâ fide*, and ought now to be compelled to compensate the plaintiff for the injustice and indignity he has met with at his hands.

Cur. adv. vult.

June 25.

YARDLEY, C. J.—This is an action of trespass for false imprisonment brought by Vithobá Malhárí, a Hindú tailor, against Mr. A. K. Corfield, Senior Magistrate of Police for the town and island of Bombay. The trespass complained of, is an imprisonment for three weeks with hard labour, to which the plaintiff was sentenced by the defendant under Rule, Ordinance, and Regulation I. of 1814 (*t*). It is necessary that I should make particular allusion (1) to the title, (2) to the preamble, and (3) to the body of that enactment. That enactment is thus intituled:—

Rule, Ordinance, and Regulation for vesting any two of Her Majesty's Justices of the Peace with power to decide in all Disputes arising between Masters and Mistresses and any of their Household Servants, Hamáls or Palanquin Bearers, and for empowering either of the Magistrates of Police to decide summarily Acts of Miscarriage and Ill-behaviour, requiring moderate though immediate Correction."

The preamble is as follows:—

"Whereas it has been found expedient to place the various descriptions of household servants, hamáls or palanquin-bearers, in the employ of the European and native inhabitants of this island, under certain regulations, whereby they may be rendered amenable for any acts of misdemeanour or

(*r*) P. 228. (*s*) 2 Moore's Ind. Appeals 293.
(*t*) Since repealed by Act XIII. of 1856.

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misconduct towards their employers, and at the same time be secured from any loss of wages or ill-treatment on the part of their employers."

The body of the Act is divided into two titles. Title I. contains Regulations with respect to servants, &c. Article 1 of that title empowers Justices of the Peace to entertain complaints respecting wages, and to award payment of any sum in respect thereof not exceeding one month's wages. Article 2 is as follows:—

"That it shall and may be lawful to and for any two Justices, upon application made upon oath by or on behalf of any master, mistress, or employer, against any servant whatever, touching any misdemeanour or ill-behaviour in such his or her service or employment, or in absenting themselves from their service on a false pretence, to hear, examine, and determine the same, and, on due proof thereof, to punish the offender by commitment to the gaol of the said town and island of Bombay, there to remain and be kept to hard labour, for a reasonable time not exceeding one calendar month, or otherwise by abating some part of his or her wages, and by discharging such servant from his or their service and employment."

It is to be observed that these two Articles seem to apply to all the descriptions of servants mentioned in the preamble, but that is not the case with the 3rd and 4th Articles. The 3rd Article relates to the misconduct of masters and mistresses; it prohibits masters, &c., from discharging servants before the end of their term, and subjects such masters, &c., to a fine of Rs. 20 for disobedience to this Article. The 4th Article relates to the misconduct of servants; it is as follows:—

"If any servant, hired by any master or mistress, depart from them before the end of his or her term, unless it be for some reasonable and just cause, to be shown to two of the Justices for the town and island of Bombay; or if any servant, at the end of his or her term, depart from his master or mistress without seven days' warning; every servant so departing shall, on complaint made thereof by the master or mistress to two of the Justices of the town and island of Bombay, and on due proof thereof, be punished, at the discretion of the said two Justices, by a fine not exceeding one month's wages, or by commitment to the gaol of the said town and island of Bombay, there to be kept at hard labour for a reasonable time not exceeding one month, or otherwise by abating some part of his or her wages."

It is to be recollected that all proceedings taken by masters under Article 2 are thereby required to be "upon application made upon oath." The words "on due proof" are to be found in the 4th Article, and must, I think, be taken to mean such proof as is contemplated by Article 2, namely, proof upon oath; and even if there had been no previous language in the enactment requiring that the Justice should take information upon oath, those words "on due proof" would, I am much inclined to think, be sufficient to require him to take information upon oath in complaints under Article 4. I need not inform the defendant or his advisers that nothing but testimony upon oath is due proof. The second title of the enactment applies to hamáls and palanquin-bearers. Upon a careful review of the whole of this Rule, Ordinance, and Regulation, I am clearly of opinion that it was not intended that it should apply to any other servants than household servants, hamáls and palanquin-bearers.

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It appears in evidence that the plaintiff was taken before Mr. Corfield, and was charged with misbehaviour as a domestic servant in leaving his master's service without warning. Mr. Corfield was aware that the plaintiff was a dirzi or tailor; and the first question arising in this case is, whether the tailor is a servant within the description of "household servant," or a servant at all. Now I am clearly of opinion that, even though hired by the week or the month, he is not a servant any more than a carpenter taken into a house to work at a salary for a given time, or than a seamstress, paid by the month or by the week, as in England. We are clearly of opinion that a tailor is not a household servant, (and I am of opinion myself that he is not a servant at all,) and, therefore, that the case was not one within the jurisdiction of the Magistrate. The very first thing required is that the person charged comes within the description of persons contemplated by the Act, namely "household servants, hamáls or palanquin-bearers." Upon the general view of the Statute I think that there should be an information upon oath, and that if the Justice proceed to hear the case without a complaint upon oath, he has no jurisdiction, and, therefore, I am of opinion that in the present case the defendant acted without jurisdiction. But it has been argued that this Court has no power to enquire into these facts, inasmuch as it is said that the conviction is conclusive evidence of the facts which it finds, and that those facts show a jurisdiction in Mr. Corfield to entertain and decide upon the case; and that accordingly the conviction constitutes a complete bar to an action of trespass against the Magistrate. In support of this view a great number of authorities were cited, the principal of which is the case of *Brittain* v. *Kinnaird* (*u*), generally known as "the bumboat case;" *Queen* v. *Bolton* (*v*), and other cases; but there is a numerous class of cases showing that a magistrate cannot give himself jurisdiction by finding that to be a fact which is not a fact; as in that very case of *Queen* v. *Bolton*, Lord *Denman* says, "The magistrates cannot, as is often said, give themselves jurisdiction merely by their own affirmation of it." But the short answer to this objection as to the incontrovertibility of the conviction is, that in fact there is nothing here that can be properly called a conviction,—that which has been so called being merely a loose memorandum of what passed at the Police Office. But it has been said that inasmuch as it has been the practice in Bombay not to draw up a formal conviction at all, that memorandum is conclusive. Now I am of opinion that no such weight or solemnity is to be attached to it. I will refer to it in order to show what degree of weight is to be attributed to it. It is as follows:—"1854, July 15, No. 120. *Mr. Meason* v. *Vithobá Malhári*. For misbehaviour as a domestic servant." Afterwards "in leaving his master's service without warning" were added, not from any improper motive, but with the advice of counsel. These words were added eight or nine days ago, and were substituted for three *et ceteras*, which originally occupied their place. Then come the words "Witness, butler of Mr. M." On the opposite page is written, "18th July. Prisoner admits the charge, and states that he has a claim for wages. To be imprisoned three weeks with hard labour in the jail; and the prisoner is informed, if anything is due to him, he can bring his action in the Small Cause Court." It is observable that it is not stated in this memorandum

(*u*) 1 Brod. & Bing. 432. (*v*) 1 Q. B. 66.

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that there was any information upon oath, nor could such a statement with propriety have been introduced into any formally drawn-up conviction founded upon this memorandum. I am sure that the defendant's counsel will not contend that any such averment could properly have been so introduced.

The Advocate General.—Of course not.

Yardley, C. J.—I am perfectly certain that the learned counsel would not have advised any such proceeding; therefore, even supposing that a formally drawn-up conviction had been put in evidence in this case, the radical defect would, in point of fact, still remain, that there was no information upon oath. This memorandum is inaccurate in one respect: it contains the words, in Mr. Corfield's handwriting, "Witness, butler of Mr. M." Now Mr. Corfield must perfectly well know that no person can be truly described as a witness who does not give his evidence upon oath. Every casual bystander might just as well be denominated a witness as in this case the butler of Mr. Meason. I should have been very much better pleased, therefore, if he had omitted those words. Really this so called "conviction" is no conviction: it is a loose and inadequate memorandum; and, therefore, cannot be considered at all as falling within the cases cited with reference to the incontrovertibility of convictions, qualified as the doctrine on that subject is, in the manner already stated, by Lord *Denman*. This is, then, the first ground on which we hold that Mr. Corfield had no jurisdiction.

If the plaintiff had been a servant within the Regulation of 1814, the Magistrate could not have proceeded without information upon oath. The 1st Article over-rides the whole of the Regulation, and requires that the application should be made upon oath. It is not to be expected that the Legislature is to go on repeating it in every section. Moreover, our attention has been called by the counsel for the plaintiff to an Act of the Legislative Council of India, No. II. of 1839, which requires that in all cases in which offenders may be punishable by fine, according to the provisions of any Act heretofore passed or which hereafter shall be passed by the Legislative Council, the magistrate is required to receive proof of the commission of the offence upon oath; and that Act becomes applicable to the present case by reason of Act III. of 1841, which empowers one magistrate to act in cases falling within Rule, Ordinance, and Regulation I. of 1814, which authorises the infliction of a fine upon a servant guilty of the offences contemplated by Articles 2 and 4 of that Regulation. Therefore that alone would have rendered an information upon oath necessary.

I entirely acquit Mr. Corfield of having anything to do with the first arrest; that is to say, there is no evidence of his being concerned in it. If it were illegal, he is not responsible. Therefore, it would be quite irrelevant if I were to expatiate upon the conduct of Mr. Meason, or upon anything which occurred until the plaintiff was brought before Mr. Corfield. But from that time I hold, and do most distinctly hold, that he had no jurisdiction to proceed in this case without information upon oath, and in so proceeding it is the same thing as if Mr. Corfield had met the plaintiff in the street, and had asked him if he had left his master without giving warning, and the plaintiff answering that it was true he had left

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because wages were due to him, and Mr. Corfield were then and there forthwith to commit him to gaol. Now a defence is set up that, inasmuch as the plaintiff had admitted his guilt, it was unnecessary to call witnesses, but it is a perversion of language to assert that what the plaintiff did say amounted to an admission of guilt; and it was well illustrated by my learned brother, in the course of the argument, when he observed that when a man accused of arson were to say—"It is true I burnt the house but I did so by accident," that might as well be called confession of guilt. The plaintiff did either of two things, upon the charge being read over to him: he either presented the petition, or he said much the same thing as what was in the petition, namely, that he left his employment because wages were due to him. To us it seems, therefore, immaterial to consider whether or not the petition was presented. On the one side there is a strong body of positive evidence in favour of the presentation of the petition; on the other side there is a somewhat weak body of negative evidence against it. The Preamble of the Act declares it expedient that servants should be rendered amenable for any acts of misdemeanour towards their employers; but the Preamble also declares it expedient that they, at the same time, should be secured from *any loss of wages* or ill-treatment on the part of their employers. This Regulation is, therefore, not one-sided; it is conceived in a spirit of perfect equity. On the one hand it compels servants to perform their duties; but on the other hand it compels dishonest or disreputable masters to pay their proper wages to their servants and not to ill-treat them. How, then, can Mr. Corfield or his professional advisers say that there was any confession at all in this case, when the plaintiff alleged as his reason for departing from his master's service the non-payment of wages? There was no further investigation in this case after the plaintiff made that statement, and Mr. Corfield entered it in his book as an admission of guilt; therefore he did not hear the case at all. I was amazed when the counsel for Mr. Corfield merely asked him, when in the witness-box, whether the usual mode of proceeding in the Police Office was adopted in this case. All that I have got to say is, that if such be the usual mode, the sooner the system is changed the more it will be for the safety of the public and of the Magistrate.

Now comes what is the most debateable point in the case. Is the Magistrate protected by Act XVIII. of 1850, entitled "An Act for the Protection of Judicial Officers"? It is as follows:—

"No Judge, Magistrate, or Justice of the Peace, Collector, or other person acting judicially, shall be liable to be sued in any Civil Court for any act done or ordered to be done by him in the discharge of his judicial duty, whether or not within the limits of his jurisdiction; provided that he at the time, in good faith, believed himself to have jurisdiction to do or order the act complained of; and no officer of any Court or other person bound to execute the lawful warrants or orders of any such Judge, Magistrate, Justice of the Peace, Collector or other person acting judicially, shall be liable to be sued in any Civil Court for the execution of any warrant or order which he would be bound to execute if within the jurisdiction of the person issuing the same."

At first sight this Act would seem to include almost all mistakes that a magistrate could make. The question whether or not Mr. Corfield is protected by it turns altogether upon the expression, "provided that he

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at the time, in good faith, believed himself to have jurisdiction to do or order the act complained of." If there had been an information duly sworn before Mr. Corfield, and if he had entered upon the case circumspectly, diligently, and carefully, and had given the plaintiff the opportunity of calling any witnesses whom he wished to call, and if, after having done all these things, he had been of opinion that the plaintiff should be convicted of the charge, I have no doubt that Mr. Corfield would have been protected,—that is to say, if his error had been one in which a reasonable and a careful man might have fallen. And that construction seems quite in accordance with the case of *Laing* v. *Gubbins* before Sir Lawrence *Peel*, C.J., which has not been reported at length, but a summary of which has been given in a note to the case of *In re Foy* in 1 Taylor and Bell's Reports. Sir Lawrence *Peel* is reported to have held that the words "in good faith" were equivalent to *bonâ fide*, and that this Act in fact protected excusable errors only, and should not be extended to inexcusable errors. No higher authority,—I say it without affectation,—could be cited upon the construction of an Act of the Indian Legislature. If this had been tried by a jury I should have left it to the jury to say, whether the Magistrate had acted reasonably, circumspectly, and carefully; and I should have added, that a man could not be said to have so acted unless he tried to avoid error. Did Mr. Corfield take this precaution? Without wishing to use any but the most measured language, I am clearly of opinion that he acted precipitately; consequently he cannot be said to have acted reasonably, carefully, and circumspectly, and therefore he is not entitled to the protection of this Act.

The remaining question is the amount of damages for the wrong and the indignity inflicted upon the plaintiff. He is entitled to reasonable and temperate damages, not only for the illegal imprisonment and hard labour which he has undergone, but also for the indignity which he has suffered. We have assessed the damages at the sum of Rs. 501.

JACKSON, J.—After the elaborate judgment of the Chief Justice I do not think it necessary to enter into this case at any great length. What are the admitted facts? The plaintiff was brought before Mr. Corfield on a charge of misbehaviour as a domestic servant,—for leaving his master's employment without warning. He was called upon to plead, and his defence was that wages were due to him, and remained unpaid. This appears to us to be a good defence; but it was not so considered by the Magistrate, who, without making any other enquiry into the defence, entered it as a plea of guilty. It was also admitted that no information was taken upon oath, and that no witness was examined. There are other facts in the case which are not admitted. The first of these is, that the charge was not read out to him as it now stands in the book, as there were three *et ceteras* in the place now occupied by the words "for leaving his employment without warning." It is also contended on behalf of the plaintiff that a petition was presented by him to Mr. Corfield, in which he clearly set up his defence, and this statement is supported by affirmative testimony which, in our opinion, is of more value than the mere negative testimony of others who say they do not recollect the presentation of this petition. The latter facts, however, are not very material, as the admitted facts of the case are sufficient.

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What is the result to be deduced from these facts, and what are the merits of this case? First, the charge of leaving his master's employment without warning is not a charge necessarily involving any criminal offence, and is perfectly consistent with his complete innocence of any crime. In Seth Turner's Case (*w*) it is clearly laid down that a mere charge against a servant of absenting himself from his employment is not sustainable, unless it allege that he did so without lawful excuse. Mr. Justice *Williams* says, "I always thought that the law was properly laid down by Lord *Mansfield* in *Rex* v. *Corden*, that if the fact as charged may be consistent with the innocence of the prisoner, no offence is charged;" and this is the view taken by the Legislature in framing this Regulation I. of 1814, under which Mr. Corfield has proceeded; for the offence defined by that Regulation is not that of a servant absenting himself without leave, but of a servant absenting himself without "reasonable and just cause." The charge as now entered in the book is not that of an offence punishable at law; and there was, therefore, a want of jurisdiction in the Magistrate proceeding on such a charge. He was also without jurisdiction, because he proceeded, as is admitted, without an information upon oath. Mr. Justice *Williams* shows how material it is that there should be such an information. He says: "It is argued that the information is merely a notice given to show what is to be proved; but that is not so; it is the foundation of the conviction, inasmuch as it is what gives the Magistrate jurisdiction, and that is the reason why it is examined so strictly." So then we find in fact that there was not only no charge of a crime, but also no information upon which the jurisdiction of the Magistrate could be founded.

The Magistrate then called upon the plaintiff to plead, which he did; and the questions arising on that plea are, What was the effect of it? and Was the Magistrate justified in entering it as a plea of guilty? If the plea which he did give were true, it seems to me a perfect answer to the prosecution. [His Lordship here read the 4th Article of Regulation I. of 1814.] That Article contains the words "unless it be for some just and reasonable cause." Was it not a sufficient answer for the plaintiff to make to the charge of leaving his employment without warning, that he had not been paid his wages due to him? A servant is not bound to serve unless he is paid. To hold otherwise would be to reduce servants to the condition of slaves, and the Regulation is careful in this respect to protect servants, by inserting the words "unless it be for some just and reasonable cause." The defence was perfect, and it was a most extraordinary step on the part of the Magistrate to convert it into a plea of guilty.

It appears, then, that a great wrong has been perpetrated; and, if so, there must be an appropriate remedy. Counsel for the defendant says that an action of trespass is not that remedy. I shall refer to that point hereafter.

On the question, whether or not the plaintiff was a person falling within the description of persons contemplated by Regulation I. of 1814, it was relied upon in the argument on behalf of the defendant that the words used in Article 2 were "any servant whatever;" and that in point of fact the Regulation is applicable to all servants. This is not so; for

(*w*) 9 Q. B. 91.

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the true construction is that Article 2 applies to all the servants contemplated by the Preamble; and then the Regulation is divisible under two heads, the first consisting of the 3rd and 4th Articles, applying to household servants; and the subsequent Articles applying to the other servants mentioned in the Preamble and Article 2, namely, palanquin-bearers and hamáls. The defendant relies on the 4th Article, and the question is, therefore, whether or not the plaintiff can be considered a household servant. I observe that I have been reported as saying that a *domestic* servant was one hired for a regular period, and whose whole time was at his master's disposal; but I intended to apply and did apply that definition to a servant *simpliciter*, and not to a household or domestic servant merely. But in this case it is also necessary that a servant charged under Article 4 should be concerned in household affairs. It seems to me that this dirzi was not within that class of servants, if a servant at all; for, although he was hired for a regular period, it seems that his whole time was not given to his employer, and that he did not live in Mr. Meason's house. The mere circumstance that he sat as a tailor in the house for a certain number of hours a day, did not, I think, make him a *household* servant within the meaning of this Regulation. But then the counsel for the defendant says that the plaintiff is bound by the finding in the conviction that he is a domestic servant. It is true that he was charged as a domestic servant, but his admission with respect to that was only incidental. But in fact there is no conviction in this case; that which has been put in evidence is merely a memorandum in the Magistrate's note-book, to which it is impossible to ascribe the force and effect of a conviction, which is a regular record of the proceedings. It would be impossible to attribute to this memorandum any weight, for it is clear that it contains a serious mis-statement in describing Mr. Meason's butler as a witness, and implying that he was examined in support of the charge.

On the whole case we are clearly of opinion that the plaintiff did not fall within the scope of Regulation I. of 1814, and that Mr. Corfield proceeded without jurisdiction, not only because the plaintiff was not a domestic servant, but because no criminal offence was laid to his charge and no sworn information was taken against him; which are clearly laid down in Paley on Convictions, and other authorities, as the necessary and indispensable foundations of a conviction.

But it is said that the proper remedy is not by an action of trespass. I would refer on that point to the observations of Mr. Justice *Ashburton* in the case of *Morgan* v. *Hughes* (*x*), where he says that "where the immediate act of imprisonment proceeds from the defendant, the action must be trespass and trespass only;" and in that case, which was an action on the case against a Justice of the Peace for maliciously granting a warrant without any information, upon a supposed charge of felony, it was held that the action should have been in trespass, and that case would not lie.

According to my view, the defendant is not within the protection of Act XVIII. of 1850. I was counsel in *Laing* v. *Gubbins*, in which Chief Justice *Peel* gave an elaborate judgment, unhappily not reported; but the substance of it is correctly stated in the note quoted by my learned brother. That case decided that if the conduct of the Magistrate was not

(*x*) 2 T. R. 231.

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bonâ fide within the legal meaning of that term, the Magistrate could not be protected by this Act. If all that appeared against Mr. Corfield in this case was that he had erroneously construed this Regulation I. of 1814, —if in all other respects his proceedings had been regular,—I am not prepared to say that he would not have been protected by this Act of 1850. It would be hard that a Magistrate should be held liable upon the mere ground of his misconstruing a Statute. But in this case he has proceeded on a charge which imputed no crime to the plaintiff, without any information, or the examination of a single witness upon oath, has carelessly entered a valid defence as a plea of guilty, and has inaccurately entered on his proceedings that a witness was examined. I cannot, therefore, say that he has acted with what the law regards as *bonâ fide*. Of course I do not mean to impute to the defendant that he felt any positive malice towards the plaintiff, whom he probably never saw before in his life, but what I mean to say is that where there is such irregularity, negligence, and inaccuracy, as is found to exist in this case, the law will not permit the defendant to say that he acted *bonâ fide*.

Agents for the plaintiff Messrs. *Jefferson & Rimington*, and afterwards at the trial Dr. *Dallas*.

Agents for the defendant Messrs. *William & Lawford Acland*.

NOTE.—This Report of the leading case at this side of India on Act XVIII. of 1850, has been mainly taken from a very correct report which, immediately after the trial, was published in the form of a pamphlet by the *Bombay Gazette* Press. The judgments were taken down *verbatim* in short hand, and the present Editor can vouch for their accuracy, which he has been informed on good authority has been acknowledged by the learned Judges who decided the case. The substance only of the opening address and argument of counsel for the plaintiff is here given, as also of the evidence for the plaintiff; but the address of defendant's counsel is given in full, as also the evidence for defendant, partly because the Editor was himself one of the counsel for the plaintiff, and partly because the question, whether a Magistrate or Justice of the Peace is protected by Act XVIII. of 1850, is so completely dependent upon the facts proved, and a right appreciation of them, as to remove any objection to the publication, with the same fulness as evidence is given in the Reports of State Trials, of the evidence adduced on behalf of the defendant.—ED.

AN INDEX

TO THE

PRINCIPAL MATTERS.

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Held that the English practice should be followed as to the amount of corroboration required to support the evidence of an accomplice, which is, that when he speaks as to two or more persons having been concerned in the same offence, his testimony should be confirmed, not only as to the circumstances of the case, but also as to the identity of the prisoners; and that any prisoner as to whom his testimony is not supported should be acquitted. *Reg.* v. *Imám valad Bábán and others.* CR. CA. 57

ACCOUNTS—

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ACQUIESCENCE—

In a suit to recover possession of land, where it appeared that the defendant's father had, in A.D. 1801, obtained possession, on a lease, of 280 bighás from the Government of Kulábá, and that the plaintiffs' father had, in 1806, obtained a grant of ten unspecified bighás of the same land, but that he never asked to have them marked out and given to him *in specie*; and that he, and subsequently his sons the plaintiffs, were content, up to the year 1856, to receive from the defendant's family, in respect of their grant, the rent formerly paid by them to the Government for the same: the District Court reversed the decree of the Munsif, and threw out the claim to recover possession of the land, on the ground that the plaintiffs must be taken, after such a lapse of time, to have acquiesced in the arrangement that a yearly rent was to be received, without any particular land being marked out as theirs:—

Held that it was competent for the Assistant Judge to come to that conclusion, under the circumstances; and that there was no ground for saying that there was any error of law in his decision, which was accordingly affirmed. *Sule* v. *Dhundiráj Vináyak.* A.C.J. 55

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No. XI. of 1843. *Held* that the interest enjoyed by one of a body of coparceners, in possession of land attached by way of emolument to an hereditary office, cannot be bequeathed to one or more of the other coparceners: as the estate held by each sharer is only a life interest, subject to the right of the Collector, under Act XI. of 1843, to assign a fit remuneration, from the rent and profits, for the maintenance of the person appointed to conduct the duties of the office. *Bhimáppá* v. *Mariáppá*. A.C.J. 128

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No. XXI. of 1848. O.C.J. 3, 74

No. XVIII. of 1850 (PROTECTION OF JUDICIAL OFFICERS)—

1. *Held* that neither Act XVIII. of 1850, nor Secs. 68 and 212 of the Code of Criminal Procedure, protect a Magistrate who has failed to act reasonably, carefully, and circumspectly in the discharge of his duties.—*Vináyak Divákar* v. *Bái Itchá*. A.C.J. 36

2. ACT XVIII. of 1850 does not protect Judicial Officers from being sued in a Civil Court, except in respect of acts done by them in good faith in the discharge of their judicial functions.

When a plaint is presented to a Judge against such an Officer, which complains of a wrongful act on the part of that Officer, the Judge is bound to receive the plaint, and to leave it to the defendant to plead Act XVIII. of 1850. *Venkat Shrinivás* v. *Armstrong*. A.C.J. 47

See FALSE IMPRISONMENT. APPX. 6, 10, 19, 23, 26

No. XXVI. of 1850, SEC. VII., CL. 5. —*See* TOWN RULE.

No. XXXV. of 1850 (BOMBAY FERRIES)—

1. A conviction by a Full Power Magistrate, under Sec. 9 of the Bombay Ferries' Act, annulled for want of jurisdiction, as the "Magistrate of the zillah" alone was empowered by Sec. 16 summarily to hear and determine all offences against the Act. *Reg.* v. *Prabhákar N. Soman*. CR. CA. 11

2. SECS. 14 and 15. On a reference by a Session Judge, a conviction and sentence by a District Magistrate, under the Bombay Ferries' Act, for conveying passengers for hire from U'ran to Bombay was reversed; as the act charged did not constitute an offence under any section of the Act. *Reg.* v. *Malhári bin Shivji*. CR.CA. 41

No. XVII. of 1854 (POST OFFICE)— On a reference by a Session Judge in reviewing the monthly magisterial returns:—*Held* that a conviction and sentence recorded by a Magistrate F. P., under Sec. 50 of the Post Office Act, No. XVII. of 1854 [corresponding with Sec. 48 of the Act of 1866], were illegal; as the Magistrate had no jurisdiction finally to dispose of the case, but was bound to commit it for trial before the Court of Session

Reg. v. *Átmárám W. Bhandárkar.* CR.CA. 8

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No. XVIII. OF 1854 (RAILWAYS)—

1. *Held* that a conviction by a Magistrate F. P. under Sec. 26 was illegal, for want of jurisdiction. *Reg.* v. *Lakshuman Báláji.* CR CA. 10

2. By Sec. 35 of the Railway Act District Police Officers in the Presidency of Bombay could punish, to the extent of the powers conferred upon them, in petty offences, any offence made punishable under the Act, by fine not exceeding Rs. 20.

But Sec. 5 of Reg. XII. of 1827 (authorising the appointment of District Police Officers), and Sec. 41 of the same Regulation (defining the limits of their jurisdiction), being both repealed by Act XVII. of 1862 :—

Held that a Subordinate Magistrate had no jurisdiction to impose a fine, under Sec. 17 of the Railway Act. *Reg.* v. *Tribhuvan Ishvar.* CR.CA. 54

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No. XIV. OF 1859 (LIMITATION)—

SEC. I., CL. 10.—*See* YEARLY TENANT.

——— CL. 16. A.C.J. 28

SEC. VIII.—

In a suit for the balance of an account with interest in a case of mutual dealings between traders, where the High Court had directed the production of the defendants' books of account, and was satisfied, after receiving the report of the District Judge, that there were such books in existence, and that no satisfactory excuse for their non-production was given ; and where the defendant had otherwise conducted his case in a very suspicious manner :—

Held (reversing the decree of the District Court) that the plaintiff was entitled to judgment, on a *primâ facie* case being made out by him ; and that the suit as regards limitation came within the provision of Sec. VIII. of Act XIV. of 1859 : *Fernandes* v. *Vásudev Shánbog.* A.C.J. 82

SEC. XV. A.C.J. 108

SECS. XX. and XXI.—

1. *Held* that Sec. XX. (and not Sec. XXI.) of Act XIV. of 1859 applies to decrees or orders made after the 4th of May 1859; and that the words "in force at the time of the passing of this Act," must be construed to mean the time when the Act received the assent of the Governor General, namely, the 4th of May 1859, and not the 1st of January 1862, the time when (by Act XI. of 1861) it came into operation. *Ex parte Kálidás Dámodhar: Ex parte Bápúji Pitámbar.* A.C.J. 175

2. In the case of a decree, which was passed in 1831, and part payment made on the 2nd of February 1859, so that it was "in force at the time of the passing of" Act XIV. of 1859 (4th May 1859), the Sadr Amín rejected an application for execution made on the 19th of April 1865; but the District Judge reversed his order, being of opinion that decrees referred to in Sec. XXI. of the Act might be saved from the operation of Sec. XX., even though no process of execution had issued within the time provided for by Sec. XXI.:—

Held that the right construction of the Act was to keep these sections distinct, by applying Sec. XX. to decrees or orders made after the passing of the Act, and Sec. XXI. to decrees or orders in force at the time of its passing; and that it was not necessary to resort to Sec. XX. in constructing Sec. XXI., if the word "may" in the latter section were read as equivalent to *must* or *shall*, on the principle that affirmative words sometimes imply a negative of what is not affirmed, as strongly as if expressed.

Semble, where the issuing of the execution within the time limited by Sec. XXI. was prevented by the delay of the court which was to execute the decree, such court would have power to prevent an unjust prejudice to the suitor by the delay unavoidably arising from its own act, by ordering the execution to issue as of the date when it would have been issued if there had been no such delay. *Bái U'dekúvar* v. *Múlji Náran.* A.C.J. 177

See LIMITATION, DEFENCE OF.

No. VII. OF 1860.—*See* INDIAN COMPANIES' ACTS, 3. O.C.J. 121, 126

SEC. XI. O.C.J. 162

No. XXVII. OF 1860, SECS. 1, 13. A.C.J. 9

No. XXXVI. OF 1860 (STAMP)—

Conviction and sentence for an offence under, reversed on a reference by a Session Judge; as the proceedings of the Magistrate who tried the case were highly irregular. *Reg.* v. *Devaṅvat.* CR. CA. 34

See STAMPING.

No. XI. OF 1861.—*See* ACT XIV. OF 1859, SECS. XX. and XXI., 1.

No. XXIII. of 1861—

SEC. 11.—*See* SEPARATE SUIT.

SEC. 37.—*See* APPEAL, ABATEMENT OF. A.C.J. 81, 87

SEC. 38. A.C.J. 175

No. X. OF 1862.—*See* STAMPING.

SECS. 2 and 3. O.C.J. 72

Secs. 15, 16, 17. O. C.J. 154n., 155 A.C J. 95

Sec. 17, Cl. 1.—*See* Appeal. A.C.J. 93, 96

Sec. 52. CR. CA. 36n

Schedule A, Cl. 10. *See* Shares, Sale of, 2.
Cl. 12, 22, 46. A.C.J. 100

No. XVII. of 1862.—*See* Act XVIII. of 1854, 2. CR. CA. 12

No. VI. of 1864 (Whipping)—

1. In the case of a conviction of attempting to commit housebreaking by night, with intent to commit theft, a sentence of whipping was annulled as being illegal. *Reg.* v. *Yellá valad Parshiá.* CR. CA. 37

2. On a reference by a Session Judge under Sec. 434 of the Crim. Proc. Code, a sentence of whipping in addition to one of rigorous imprisonment, in the case of an offence specified in Sec. 2 of Act VI. of 1864, was annulled; as the offence was *committed* after previous conviction. *Reg.* v. *Súryá K.Mándavkar.* CR.CA. 38

Secs. 2, 3, and 4. CR CA. 37n

No. XVI. of 1864, Sec. 15. A.C.J.104

No. XX. of 1864 (*Bombay Minors*)—
Secs. 6, 9, 10, 16, 24—

Held that persons appointed Administrators to a minor's estate under Sec. 6 of the Bombay Minors' Act are not liable to furnish an inventory and accounts under Sec. 16 of the Act. *Vallabhdás Hiráchand and another* v. *Gokaldás Tejirám.* A.C.J. 89

No. XI. of 1865, Sec—6. *See* Hindu Temple.

No. XV. of 1865—

A Pársi residing in Bombay, after the passing of Act XV. of 1865, but before it came into operation, contracted a second marriage, during the lifetime of his first wife, from whom he had not been divorced, and whom he, moreover, wilfully deserted for two years.

On appeal from an order by the Judge of the Pársi Chief Matrimonial Court, rejecting a plaint for divorce by the first wife, on the ground that the subject-matter of the plaint did not constitute a cause of action, under Sec. 30 of Act XV. of 1865, and Act VIII. of 1859, Sec. 32:—

Held that the facts alleged in the plaint did not amount to "bigamy coupled with adultery," nor to "adultery coupled with wilful desertion," within the meaning of Sec. 30 of Act XV. of 1865; as a second marriage contracted by a Pársi husband, during the lifetime of his first wife, was not unlawful before the Act came into operation; nor did the provisions of the Act in any way affect the validity or the consequences of such a marriage. *Avábái* v. *Jámáji Jamshedji and another.* A.C.J. 113

Secs. 4 and 53. A.C.J. 115

No. XXVIII. of 1865—

An order, made under Act XXVIII. of 1865, for the winding up of the estate of a trader, not only stays the further prosecution of suits &c. against him, but also prevents the

completion of an execution against his immoveable or ordinary moveable property, if such execution have not been consummated by seizure and sale before the filing in court of the resolutions passed at the meeting of creditors; unless the leave of the Court be given to the execution creditor to proceed notwithstanding the winding-up order.

Such leave ought not to be given except upon special grounds.

Lâches of the execution creditor will be an obstacle to his obtaining such leave.

Under the Insolvent Debtors' Acts (1 & 2 *Vic., C.* 110—English repealed Act; 11 & 12 *Vic., C.* 21, India) the mere delivery of the writ of *fi. fa.* to the Sheriff or his deputy for execution, bound the goods as against the assignees in insolvency, although there had been neither seizure nor sale under the writ. The property in the goods passed to the assignees in insolvency, subject to the right of the execution creditor to have satisfaction of his debt by sale. But in bankruptcy the law is otherwise. The execution must be levied by seizure and sale before the date of the fiat or the filing of the petition for adjudication; otherwise the execution creditor is entitled only to a rateable part of his debt with the other creditors.

The practice of the High Court under the Civil Procedure Code on the execution of decrees for money, either against immoveable or moveable estate, has been, in the first instance, to issue a writ of attachment, and subsequently, on its return by the Sheriff duly executed, to issue a writ directing a sale. The writ of *fi. fa.*, which issued from the Supreme Court, was an authority to the Sheriff not only to seize, but also to sell. Sec. 250 of the Civil Procedure Code applies neither to executions against immoveable property, nor to executions against debts due to the defendant: and in order to give to third parties full opportunity of vindicating their rights before sale, and also to give the defendant an opportunity of paying, it has not been usual to issue process for attachment and sale simultaneously, even against personal property, and it would not seem to be proper to do so, except under special circumstances. *Financial Association of India and China* v. *Pránjivandás Harjivandás and another.* O.C.J. 25

No. X. of 1866.—*See* Indian Companies' Act of 1866.

No. XX. of 1866.—*See* Indian Registration Act, 1866, 1, 2.

ACTS (BOMBAY)—

No. V. of 1862. A.C.J. 148

No. IX. of 1863 (Cotton Frauds)—

Convictions under Sec. 2 of the Act, and sentences of one month's rigorous imprisonment, as well as an order for confiscation of cotton, set aside for want of evidence to show that the Deputy Magistrate who tried the case had jurisdiction in the matter over the persons convicted; and for want of evidence of fraud.

Quære as to whether, notwithstanding Sec. 411 of the Criminal Procedure Code, a regular appeal lies in such case. *Reg.* v. *Jivan Usmán and others.* CR.CA. 14

SEC. 3. CR.CA. 14

No. V. OF 1864.—*See* DISPOSSESSION OF IMMOVEABLE PROPERTY. PUBLIC SERVANT, DISOBEYING ORDER OF.

No. III. of 1866.—*See* PARDON, TENDER OF.

ACT OF COURT.—*See* ACT XIV. OF 1859, SECS. XX. and XXI., 2.

ACTS OF DIRECTORS.—*See* SHARES, SALE OF, 1.

ACTS OF PARLIAMENT.—*See* STATUTES.

ACTUAL POSSESSION.—*See* POSSESSION FOR THIRTY YEARS, 2.

ADMINISTRATOR TO MINOR'S ESTATE.—*See* ACT XX. OF 1864.

ADVOCATE GENERAL, CERTIFICATE OF.—*See* JURY, SEPARATION OF.

AFFIDAVIT.—*See* POSTPONEMENT OF TRIAL.

ALIENATION.—*See* HINDU' FAMILY UNDIVIDED.

ALIENATION INTER VIVOS. A.C.J. 10

ALLOTTEES.—*See* SHARES, SALE OF, 6.

AMENDMENT.—*See* LIMITATION, DEFENCE OF.

AMOUNT OF STAMP DUTY.—*See* APPEAL;—STAMP.

ANNUAL STIPEND.—*See* HINDU' TEMPLE, ENDOWMENT OF.

APPEAL;—LETTERS PATENT—

Where two Judges decided a case of Original Civil Jurisdiction under the Original Letters Patent; but the decree was sealed and the appeal preferred after the Amended Letters Patent had come into operation:—

Held that the right of appeal to the High Court—constituted so as to hear an appeal from two Judges—which existed in such a case, under Sec. 14 of the old Charter, was taken away by Sec. 15 of the new Charter; as there was no reservation therein that parties should retain any right of appeal, which existed before its publication, in respect of suits then pending, of judgments given, or of decrees made, but not executed.

A right of action is not taken away by a change in the law, unless by express enactment; but in the case of mere procedure, unless something is said to the contrary, the new law, where its language is general in its terms, applies, without reference to the former law or procedure.—*Frámji Bomanji* v. *Hormasji Barjorji.* O.C.J. 49

APPEAL;—RULES OF COURT.

1. A certified copy of the Judge's notes not having been filed, and there being no certificate from the Prothonotary that security had been given for costs;—the appeal was dismissed for non-compliance with the Rules of the Court. *Bhimji Girdhar* v. *W. J. Morgan.* O.C.J. 63

2. Appeal dismissed, as the appellants had not given security for costs, and as the appeal had not been filed within the time required by the Rules of the Court.

It is sufficient for the respondent to object at the hearing of the appeal for non-compliance with the Rules

of the Court; and he need not apply specially to have the appeal rejected, when the memorandum of appeal is preferred. *Muhammadbhái Dharamsi* v. *Bhánji Topan*. O.C.J. 64

APPEAL;—STAMP—

Held that an appeal lies to the High Court from the decision of a Judge in a Division Court rejecting a document, tendered in evidence under Sec. XVII., Cl. 1, of Act X. of 1862, on the ground that there had been an intention to evade the payment of stamp duty.

The point upon which the decision of the Court is to be final, under Sec. XVII. of the Stamp Act, is as to what is the proper amount of Stamp duty which the document ought to bear, and not as to whether the Court ought, or ought not, to receive the document in evidence.

A Court to which a document is entered in evidence under Sec. XVII. ought not to reject it, unless it clearly appears that there was an intention to evade the payment of stamp duty. *Royal Bank of India* v. *Hormasji Kharsedji*. O.C.J. 153

See INDIAN REGISTRATION ACT, 2. JUDGMENT BY DEFAULT. MAGISTRATE OF THE DISTRICT, 1. PENAL RECOGNISANCE TO KEEP THE PEACE. STAMP.

APPEAL, ABATEMENT OF—

Where the special appellant died after the High Court had referred for trial, to the Court below, an issue based upon objections taken by the respondent, under Sec. 348 of Act VIII. of 1859:—

Held that the appeal must abate, in accordance with Sec. 102 of Act VIII. of 1859 and Sec. 37 of Act XXIII. of 1861; and that the respondent cannot require that it should proceed, in order that he may have an opportunity of taking objections to the decree of the Court below.

If the respondent desires to secure the right of asking for a decision on his objections, he must file a separate appeal. *Jaitu bin Kálu* v. *Bálu bin Rághu*. A.C.J. 81

APPEAL, DOES NOT LIE—

Held that no appeal lies where the sentence of imprisonment, and of further imprisonment in default of payment of a fine, does not, in the aggregate, exceed the term of one month. *Reg.* v. *Shankar Venkáji and another*. CR. CA. 15

See ACT (BOMBAY) No. IX. of 1863.

APPLICATION FOR REVIEW.—*See* POSSESSION FOR THIRTY YEARS, 1.

APPLICATION TO WITHDRAW.—*See* DOCUMENT, PRODUCTION OF WHEN PLAINT IS PRESENTED.

ARTICLES OF ASSOCIATION.—*See* SHARES, SALE OF, 1, 2, 5, 6.

ASSIGNEES. — *See* ACT XXVIII. OF 1865.

ASSISTANT COLLECTOR. — *See* MAGISTRATE OF THE DISTRICT, 1.

ATTEMPTS, PUNISHMENT FOR.—*See* ACT VI. OF 1864, 1.

ATTESTATION BY CASTEMEN.—*See* HINDU FAMILY.

BANKRUPTCY.—*See* ACT XXVIII. OF 1865.

BENGAL MINORS' ACT, MISTAKE IN COPYING.—*See* ACT XX. OF 1864.

BENGAL PRESIDENCY.—*See* JURY, TRIAL BY.

BEQUEST.—*See* ACT No. XI. OF 1843. HINDU' FAMILY.

BHA'GDA'RI TENURE. A.C.J. 139

BHA'UBAND.—*See* POSSESSION FOR THIRTY YEARS, 3.

BIGAMY.—*See* ACT XV. OF 1865.

BOARD OF DIRECTORS, ABSENCE OF SANCTION BY.—*See* SHARES, SALE OF, 5.

BOARDING-HOUSE-KEEPER AND LODGER.—*See* INNKEEPER AND GUEST.

BOMBAY MINORS' ACT.—*See* ACT XX. OF 1864.

BOND SUBSEQUENTLY STAMPED.—*See* STAMPING.

BOOKS OF ACCOUNT—

Books of Account cannot be taken in execution. *In re Pestanji Curseţji Shroff.* O.C.J. 42

See ACT XIV. OF 1859, SEC. VIII.

BOOKS, EVIDENCE OF. A.C.J. 88

BREACH OF CONTRACT.—*See* YEARLY TENANT.

BUILDING-SITE, RENT-FREE GRANT OF—

A received from B the use of his ground rent-free, which he thus acknowledged in writing: "Building a house thereon, I shall enjoy so long as I and my kinsmen *live* therein. I shall have no right to *sell* the ground to another." A house was built on the site and inhabited by A and his heirs for several years, until it was destroyed by fire, when the heirs commenced to build a new house upon a portion of the ground, having leased another portion of it for building upon, and having mortgaged the whole of it:—

Held that the heir of B was entitled to recover possession of the ground, as the conditions of the grant had not been observed; and that the word *sell* must be construed as prohibiting alienation of any kind. *Rahálkar* v. *Náráyanbhaţ.* A.C.J. 63

BURDEN OF PROOF.—*See* POSSESSION FOR THIRTY YEARS, 1.

CASUS OMISSUS. CR. CA. 42

CASTE.—*See* HINDU' FAMILY.

CAUSING HURT,—*See* CRIM. PROC. CODE, SEC. 44.

CERTIFICATE, EVIDENCE OF.—*See* INDIAN COMPANIES' ACTS, 2.

CERTIFICATE OF SALE—

Held that a certificate of sale is not a document of such a character as to be entitled by law to priority, by virtue of its being registered, over an unregistered lease; but that it comes within the class of documents described in Reg. IX. of 1827, Sec. III., Cl. 2, as "judicial processes," which may, at the option of the holder, be registered, but the force and effect of which "is in no wise to depend on their being registered." *Fakírchand Govindrám* v. *Kahándás Bhagvándás.* A.C.J. 167

CHANGE IN THE LAW.—*See* APPEAL.

CHARGE.—*See* FALSE IMPRISONMENT.

CHEATING BY PERSONATION.—*See* CRIM. PROC. CODE, SEC. 426.

CHHALA (FRAUD). O.C.J. 17

CIRCULAR.—*See* MAGISTRATE OF THE DISTRICT, 2.

CIRCUMSTANCES OF THE CASE.—*See* ACCOMPLICE.

CIVIL AND REVENUE COURT.—*See* DISPOSSESSION OF IMMOVEABLE PROPERTY.

CIVIL PROCEDURE CODE—

SEC. 1. —*See* DISPOSSESSION OF IMMOVEABLE PROPERTY. A.C.J. 109

SEC. 32.—*See* ACT XV. OF 1865.

SEC. 36.—*See* ACT XVIII. OF 1852.

SEC. 39.—*See* DOCUMENT, PRODUCTION OF WHEN PLAINT IS PRESENTED. STAMPING. A.C.J. 93

SEC. 97. O.C.J. 91

SEC. 102.—*See* APPEAL, ABATEMENT OF.

SEC. 110. O.C.J. 58

SEC. 119.—*See* JUDGMENT BY DEFAULT. O.C.J. 2

SECS. 120, 125. A.C.J. 117

SECS. 129, 130.—*See* STAMPING. A.C.J. 93

SEC. 139. A.C.J. 117

SEC. 170.—*See* ACT XIV. OF 1859, SEC. VIII. A.C.J. 87, 89

SEC. 181. O.C.J. 165

SEC. 184. A.C.J. 175

SECS. 199, 200, 201, 205. O.C.J. 43

SEC. 235. O.C.J. 33

SECS. 241, 242, 243. O.C.J. 43

SEC. 250.—*See* ACT XXVIII. OF 1865.

SECS. 256 and 257.—*See* SETTING ASIDE, 2. A.C.J. 111

SEC. 283. A.C.J. 32

SECS. 284, 287, 288, and 296.—*See* STAYING OF SUITS. O.C.J. 22

SEC. 342. O.C.J. 64

SEC. 348.—*See* APPEAL, ABATEMENT OF. A.C.J. 46

SEC. 351.—*See* DOCUMENT, PRODUCTION OF.

SECS. 354, 355. O.C.J. 83

SEC. 363. A.C.J. 99

SEC. 376. A.C.J. 54

SEC. 387. A.C.J. 32, 35

CITATION.—*See* INDIAN REGISTRATION ACT, 1866, 1.

CLAUSE IMPERATIVE, NOT DIRECTORY.—*See* SHARES, SALE OF, 2.

COLLECTOR.—*See* DOCUMENT, DESTRUCTION OF BY PARTY.

COMMISSION, MOTION FOR.—*See* POSTPONEMENT OF TRIAL.

COMMISSIONER.—*See* LIMITATION, DEFENCE OF.

COMMITTED AFTER PREVIOUS CONVICTION.—*See* ACT VI. OF 1854, 2.

COMMON LAW PROCEDURE ACT OF 1854, SECS. 60 to 65. O.C.J. 32

COMMON LAW OF ENGLAND.—*See* INNKEEPER AND GUEST.

COMPANY.—*See* SHARES, SALE OF, 1, 2. STAYING OF SUITS.

COMPANY, PURCHASE OF OWN SHARES BY.—*See* SHARES, SALE OF, 6.

COMPENSATION.—*See* CRIM. PROC. CODE, SEC. 44.

CONCURRENT JURISDICTION.—*See* DISPOSSESSION OF IMMOVEABLE PROPERTY.

CONFISCATION.—*See* ACT (BOMBAY) No. IX. OF 1863.

CONSIDERATION, INADEQUACY OF.—*See* MORTGAGE.

CONSIDERATION, WANT OF.—*See* VENDOR'S LIEN FOR UNPAID PURCHASE-MONEY.

CONSTRUCTION.—*See* BUILDING-SITE, RENT-FREE GRANT OF. ACT XXXV. OF 1850, 2. ACT XIV. OF 1859, SECS. XX. and XXI. CR. CA. 50

CONTRACTS. — *See* DEBTOR AND CREDITOR. INA'MDA'R. INNKEEPER AND GUEST. INTEREST. KHOTI' TENURE. MARINE INSURANCE. MASTER AND SERVANT. MORTGAGE. PARTNERS. SALE BY AUCTION. SALE OF SHARES. YEARLY TENANT.

CONTRIBUTORY. — *See* INDIAN COMPANIES' ACTS, 2. SHARES, SALE OF, 5, 6.

CONVICTION. — *See* ACT VI. OF 1864, 1, 2.

COPARCENERS.—*See* ACT No. XI. OF 1843. HINDU' FAMILY, UNDIVIDED. TESTAMENTARY POWER, HINDU' LAW.

COPY.—*See* DOCUMENT, DESTRUCTION OF BY PARTY. INDIAN REGISTRATION ACT, 1866, 1.

COPY, FILING OF.—*See* DOCUMENT, PRODUCTION OF WHEN PLAINT IS PRESENTED.

CORROBORATION. — *See* ACCOMPLICE.

COSTS.—*See* APPEAL;—RULES OF COURT.

COTTON.—*See* ACT (BOMBAY) No. IX. OF 1863.

COURT OF EQUITY.—*See* MORTGAGE.

COURT OF SESSION.—*See* ACT XVII. OF 1854. CRIM. PROC. CODE, SEC. 373. JURY, TRIAL BY. PENAL RECOGNISANCE TO KEEP THE PEACE.

COURTS, CIVIL AND REVENUE. —*See* DISPOSSESSION OF IMMOVEABLE PROPERTY.

CRIMINAL BREACH OF TRUST. —*See* CRIM. PROC. CODE, SEC. 373.

CRIMINAL PROCEDURE CODE.—*See* JURY, TRIAL BY.

SEC. 14.—*See* MAGISTRATE OF THE DISTRICT, 1.

SEC. 44—

On a reference by a Session Judge, an order made by a Magistrate under Sec. 44 of the Criminal Procedure Code—awarding compensation to the complainant out of a fine inflicted for causing hurt—reversed: as there was no evidence on the record to show that "loss" was caused, or that "any special damage of a pecuniary nature resulted," to the complainant by the offence. *Reg.* v. *Samsen Bábáji.* CR. CA. 43

SEC. 62. CR. CA. 34*n*

SECS. 66, 67. CR. CA. 35

SEC. 68.—*See* ACT XVIII. OF 1850.

SEC. 114. A.C.J. 40

SEC. 209.—*See* PARDON. CR.CA. 60*n*

SEC. 212.—*See* ACT XVIII. OF 1850.

SEC. 277.—*See* MAGISTRATE OF THE DISTRICT, 2.

SECS. 280, 295.—*See* PENAL RECOGNISANCE TO KEEP THE PEACE.

SEC. 296.—*See* GOOD BEHAVIOUR. PENAL RECOGNISANCE TO KEEP THE PEACE.

SECS. 322 to 354 (Trial by Jury). CR. CA. 56.

SEC. 373—

A conviction and sentence for criminal breach of trust as a public servant, reversed, owing to irregularities in the preliminary inquiries, and irregular procedure as to the examination of the prisoner in the Court of Session. *Reg.* v. *Diaz*. CR. CA. 51

SEC. 404.—*See* EXTORTION. OPIUM, ILLEGAL POSSESSION OF. CR. CA. 12, 18, 51

SEC. 409.—*See* PENAL RECOGNISANCE TO KEEP THE PEACE.

SEC. 411.—*See* ACT (BOMBAY) No. IX. OF 1863. APPEAL, DOES NOT LIE. CR. CA. 13

SEC. 412.—*See* MAGISTRATE OF THE DISTRICT, 1.

SEC. 426—

On a reference by a Session Judge, in reviewing the monthly magisterial returns, where the conviction by the Magistrate was for cheating by personation, and the offence appeared to the High Court to be furnishing false information,—for which the punishment awarded was legal:—

Held that the Court, under Sec. 426 of the Crim. Proc. Code, ought not to interfere with the conviction or sentence. *Reg.* v. *Rájhojí bin Kánoji*. CR.CA. 42.

SEC. 427. CR. CA. 9

SEC. 429. CR. CA. 4, 5, 7, 33

SEC. 434.—*See* ACT No. VI. OF 1864, 2. CR. CA. 1, 9, 10, 11, 36, 38, 40, 43, 53, 54

DAMAGE.—*See* CRIM. PROC. CODE, SEC. 44.

DEBTOR AND CREDITOR—

The defendant being indebted to the plaintiff in the sum of Rs. 574-5-0, the amount of the plaintiff's bill against the ship "Compta," of which the defendant was master, they both went to the office of the ship's dubásh in Bombay, where the defendant signed the bill as correct, and ordered the dubásh to pay the amount. The dubásh gave the plaintiff Rs. 500 in cash, saying he would pay the balance next day. The plaintiff said he would prefer a "receipt" for his bill, and returned the Rs. 500. An acknowledgment was then given to him, by which the dubásh promised to pay the bill for Rs. 574-5-0, "immediately on the money being received from Mr. S."

On the day following, the plaintiff took out a summons in the Small Cause Court against the defendant, whom he arrested, on making an affidavit that he was about to leave Bombay; and the Court held that "the rewas no valid substitution of the liability of any person or fund, in place of the original liability of the defendant;" and gave judgment for the plaintiff for Rs. 574-5-0 and costs; which judgment, as to the principal sum, was affirmed by the High Court, but costs on the sum of Rs. 500, originally paid to, and returned by, the plaintiff, were disallowed. *Allárakhiá Alí* v. *Geach*. O.C.J. 150

DECREE.—*See* ACT XXVIII. OF 1865. POSSESSION FOR THIRTY YEARS.

DEED, OPPRESSIVE CONDITIONS OF SET ASIDE.—*See* MORTGAGE.

DEFECT, CORRECTING A.—*See* REMAND, 1.

DEPOSIT OF WILL.—*See* INDIAN REGISTRATION ACT, 1866, 1.

DESCENDANTS.—*See* REUNION.

DHARM.—*See* HINDU' FAMILY.

DIRECTIONS AS TO ACCOUNT TO BE TAKEN.—*See* MORTGAGE.

DIRECTORS.—*See* SHARES, SALE OF, 1, 2, 5.

DISCRETION.—*See* STAMP.

DISCRETION OF JUDGE.—*See* JURY, SEPARATION OF.

DISHONESTLY.—*See* EXTORTION.

DISMISSAL.—*See* INSOLVENT COURT, RULES OF.

DISPOSSESSION OF IMMOVEABLE PROPERTY—

Held that the Civil and the Revenue Courts have concurrent jurisdiction to hear and decide suits in regard to immediate possession. *Ex parte Nagavá kom Jakan Gaudá.* A.C.J. 108

DISTRICT POLICE OFFICERS.—*See* ACT XVIII. OF 1854, 2.

DIVISION OF ENJOYMENT.—*See* HINDU' FAMILY.

DIVISION OF OWNERSHIP.—*See* HINDU' FAMILY.

DIVORCE.—*See* ACT XV. OF 1865.

DOCUMENT.—*See* APPEAL, STAMP. POSSESSION FOR THIRTY YEARS.

DOCUMENT, ADMISSION OF.—*See* REMAND, 3.

DOCUMENT, DESTRUCTION OF BY PARTY—

In a suit brought against a Collector to compel him to refrain from preventing the plaintiff executing his decree against certain land—the only issue being, whether the land was the private property of the judgment debtors, or Government service land—the plaintiff alleged that the land had been granted in free *inám* by a *sanad*, which he petitioned the Mámlatdár of the parganá to search for, and send to the Collector; and, on a reference by the High Court, the District Judge found that "the Collector did destroy the document that purported to be a copy of a *sanad* such as the plaintiff petitioned the Mámlatdár to search for:"—

Held that it was not competent for the defendant to say that the document was not such a one as could be legally admitted in evidence; and that the case came within the rule *omnia præsumuntur contra spoliatorem. Ardeshir Dhanjibhái* v. *The Collector of Súrat.* A.C.J. 116

DOCUMENT, PRODUCTION OF WHEN PLAINT IS PRESENTED.

In a suit brought upon a promissory note, where the note was produced when the plaint was presented, and marked by the officer of the Court; but the Judge, at the hearing, refused to receive it, when tendered in evidence, because he found that there was no *copy* of the note among the papers, and the plaintiff's counsel was unable to explain the omission; and, there being no applica-

tion made to withdraw, the suit was dismissed :—

Held that the Judge ought to have received the note in evidence, as it was "produced in court by the plaintiff, when the plaint was presented" (Sec. 39) ; that the plaintiff's counsel was not bound, under the circumstances, to apply to withdraw the suit ; and that the Judge was not justified in dismissing the suit—which was, accordingly, remanded, under Sec. 351 of the Code, with a direction that it should be restored to its original place on the Register, and be tried by one of the Judges of the Court. *W. B. Thompson* v. *Jehángir Hormasji.* O.C.J. 66

See STAMPING.

DOMESTIC SERVANT.—*See* FALSE IMPRISONMENT.

EJECTMENT. — *See* INA'MDA'R. YEARLY TENANT.

ENGLISH COMPANIES' ACT OF 1862—

SEC. 85. O.C.J. 28, 29

SEC. 87. O.C.J. 28, 29, 30

SECS. 197, 201. O.C.J. 28, 29

SEC. 231. O.C.J. 23

EQUITABLE MORTGAGE. — *See* ACT XXVIII. OF 1865.

EQUITY OF REDEMPTION.—*See* REMAND, 3.

ERROR IN LAW.—*See* ACQUIESCENCE. JURY, SEPARATION OF. STAMP.

ESTOPPEL.—*See* SHARES, SALE OF, 6.

EVIDENCE OF FRAUD.—*See* ACT (BOMBAY) NO. IX. OF 1863.

EXAMINATION OF PRISONER.—*See* CRIM. PROC. CODE, SEC. 373.

EXECUTION.—*See* BOOKS OF ACCOUNT.

EXECUTION OF DECREE.—*See* ACT XIV. OF 1859, SECS. XX. and XXI. ACT XXVIII. OF 1865. SETTING ASIDE, 1, 2.

EXECUTION OF DECREE FOR MONEY. — *See* ACT XXVIII. OF 1865.

EXTORTION—

A conviction of extortion by a Full Power Magistrate, and an order of a Session Judge rejecting an appeal therein, reversed by the High Court, under Sec. 404 of the Crim. Proc. Code : as there was no such *fear of injury* as is contemplated by Sec. 383 of the Ind. Pen. Code ; nor was the delivery of money by the complainants *thereby induced ;* nor did it appear from the evidence that the money was obtained *dishonestly* by the prisoner, who might have demanded it, believing in good faith that he was entitled to it. *Reg.* v. *A'bdul Kádar.* CR.CA. 45

FABRICATION OF DOCUMENT. —*See* POSSESSION FOR THIRTY YEARS, 2.

FACTUM OF WILL.—*See* INDIAN REGISTRATION ACT, 1866, 1.

FALSE CHARGE—

Where a person is charged, under Sec. 211 of the Penal Code, with having, with intent to injure, falsely charged another with an offence, knowing that there is no just and lawful ground for the same, the party accused should be allowed to show

the information on which he acted; and the Judge ought not only to be satisfied that the facts alleged as the ground for making the charge, are in themselves untrue and insufficient, but also that they were known to be such to the accused when the charge was made by him. *Reg.* v. *Navalmal valad Umedmal.* CR. CA. 16

FALSE IMPRISONMENT—

Held that an action of trespass for false imprisonment lay against a Magistrate who proceeded without jurisdiction to convict a tailor charged before him, under Bombay Rule, Ord., and Reg. I. of 1814, for "misbehaviour as a domestic servant;" there being no information or evidence on oath of the offence charged, as required by the Regulation, as well as by Act II. of 1839; and the plaintiff not being a *domestic* servant, or any servant within the scope of the Regulation, and, when called upon to plead, having stated that he left the service because there were wages due to him from his employer; upon which statement he was convicted, without any proper investigation into the truth of it.

Held also that a Magistrate who failed to act reasonably, carefully, and circumspectly cannot be said to have "*in good faith* believed himself to have jurisdiction," within the meaning of Act XVIII. of 1850; and, consequently, that he cannot claim the protection of that Act in an action brought against him in a Civil Court.

Where a legislative enactment renders a servant punishable who leaves his employer's service without due warning, a charge under such an enactment will not be sustainable, unless it aver, not only that the accused left his employer's service without giving the required warning, but also without lawful excuse. *Vithobá Malhári* v. *A. K. Corfield.* APPX.

FEAR OF INJURY.—*See* EXTORTION.

FELONY.—*See* JURY, SEPARATION OF.

FERRIES. — *See* ACT XXXV. OF 1850, 1, 2.

FINDING.—*See* MARINE INSURANCE.

FINE.—*See* ACT XVIII. OF 1854, 2.

FIXED TIME.—*See* INNKEEPER AND GUEST. SHARES, SALE OF, 1.

FORFEITURE.—*See* BUILDING-SITE, RENT-FREE GRANT OF. SHARES, SALE OF, 1.

FRAUD.—*See* ACT (BOMBAY) NO. IX. OF 1863. MORTGAGE. SHARES, SALE OF, 2.

FRAUDS, CONSTRUCTIVE. O.C.J. 15

FRESH PETITION.—*See* INSOLVENT COURT, RULES OF.

FULL POWER MAGISTRATE.—*See* OPIUM, ILLEGAL POSSESSION OF.

FURNISHING FALSE INFORMATION. — *See* CRIM. PROC. CODE, SEC. 426.

FUTURE CROPS.—*See* MORTGAGE.

FUTURE DELIVERY.—*See* SHARES, SALE OF, 3, 4,

GAMING.—*See* PARDON, TENDER OF.

GARNISHEE. O.C.J. 33, 41*n*

GATKULI LAND. A.C.J. 150

GIFT OF SHARE IN UNDIVIDED PROPERTY.—*See* HINDU' FAMILY, UNDIVIDED.

GOOD BEHAVIOUR, SECURITY FOR—

A direction annexed to a sentence of imprisonment under Sec. 448 of the Ind. Pen. Code—that the convict be brought up, at the expiration of the sentence, in order that he may give security for good behaviour for the period of one year—reversed: as not being authorised by Sec. 296 of the Crim. Proc. Code. *Reg.* v. *Krishṇáji B. Gáikavád.* CR. CA. 39

GOVERNMENT SERVICE LAND. —*See* DOCUMENT, DESTRUCTION OF BY PARTY.

GRANT OF LAND.—*See* ACQUIESCENCE.

HEREDITARY ALLOWANCE. —*See* POSSESSION FOR THIRTY YEARS, 3.

HINDU' FAMILY—

The fact of the members of two branches of a Hindú family being separate in food and worship is quite compatible with their never having been separate in estate.

A document providing separate house accommodation for the members of each of the two branches, points rather to a division of enjoyment, than to a division of ownership or estate.

The absence of attestation by castemen to documents, by which a Hindú affects to deal with his property as though he were separate in estate, is a circumstance which throws suspicion on the fact of an alleged separation; as the presence of such would be satisfactory evidence of a state of things generally believed to be true at the time.

Bequest of property in *dharm* to the caste.—*Chhabilá Mánchand* v. *Jadávbái and others.* O.C.J. 87

HINDU' FAMILY, UNDIVIDED—

Held that, on this side of India, a member of an undivided Hindú family cannot, without the consent of his coparceners, make a gift of his share in the undivided property, or dispose of it by will. *Gangubái and another* v. *Rámanná bin Bhimanná.* A.C.J. 66

HINDU' FEMALE. —*See* HINDU' TEMPLE, ENDOWMENT OF.

HINDU' LAW.—*See* INTEREST. HINDU' FAMILY. POSSESSION FOR THIRTY YEARS. REUNION. TESTAMENTARY POWER.

HINDU' TEMPLE, ENDOWMENT OF—

In a suit by the widow of one of the descendants of the grantee of a *varshásan*, or annual allowance,—paid from the Government treasury for the performance of religious service in a Hindú temple,—to recover arrears due to her husband's branch of the family from another descendant, who had received the whole stipend; and where it was found by the Court below that by the usage of the family, the duties of the office had been performed in rotation, and the stipend distributed amongst the descendants of the grantee in certain fixed proportions:—

Held that it was not competent to the defendant (the special appellant) to raise the question of the non-divisibility of the *varshásan*.

Held, also, that this was not a suit for money due on a contract, or "for personal property," or otherwise within the meaning of Sec. 6 of Act XI. of 1865, cognisable by a Court of Small Causes in the Mofussil.

Quære, Whether the appropriation of an annuity which is in the nature of a religious endowment as private property is justified by Hindú law.

Quære, Whether a Hindú female is competent to perform, either in person or vicariously, the services for the maintenance of which a religious endowment has been granted. *Keshavbhat* v. *Bhágirathibái*. A.C.J. 75.

HINDU' TESTATOR.—*See* TESTAMENTARY POWER, HINDU' LAW.

HOTEL.—*See* INNKEEPER AND GUEST.

HOUSE-BREAKING BY NIGHT.—*See* ACT VI. OF 1864, 1.

IDENTITY OF PRISONER.—*See* ACCOMPLICE.

IGNORANCE.—*See* MORTGAGE.

ILLEGAL CIRCULAR.—*See* MAGISTRATE OF THE DISTRICT, 2.

ILLEGAL COMPANY, SUIT AGAINST FOR SHARE CERTIFICATES.—*See* INDIAN COMPANIES' ACTS, 3.

ILLEGAL CONTRACT.—*See* INDIAN COMPANIES' ACTS, 1.

IMMEDIATE POSSESSION.—*See* DISPOSSESSION OF IMMOVEABLE PROPERTY.

IMMOVEABLE PROPERTY, SALE OF.—*See* SETTING ASIDE, 2.

INA'M.—*See* DOCUMENT, DESTRUCTION OF BY PARTY.

INA'MDA'R—

Where a family of kulkarṇís in the Konkaṇ was proved to have been in actual occupation of land under an inámdár, for ninety years, at a uniform rent:—

Held, in the absence of proof of any lease for a more limited term, as alleged by the plaintiff, that the occupants were entitled to hold as long as they paid the usual rent. *Aṇṇáji Appáji* v. *Kási A'tmáji and others*. A.C.J. 124

INDIAN COMPANIES' ACTS—

1. In a suit filed on the 28th of April 1866, and brought by a Joint Stock Company, after registration, to recover damages for breach of a contract made with the defendants before registration:—

Held (by *Couch*, C. J., and *Arnould*, J., affirming on appeal the decree of *Sargent*, J.) that the contract was illegal, under Sec. 2 of Act XIX. of 1857, and that the plaintiffs could not sue upon it.

Where the law is altered while a suit is pending, the law as it existed when the action was commenced must decide the rights of the parties; unless the Legislature, by the language used, show a clear intention to vary the mutual relations of such parties. *Gujarát Trading Company* v. *Trikamji Velji and Co.* O.C.J. 45

2. The Register of Shareholders, required by Sec. 14 of Act XIX. of

1857, may consist of particulars entered in different books, which, taken together, substantially contain all the information which the Act requires.

If there be a substantial compliance with the requisitions of the Act, the Register is not invalidated by reason of slight deviations from its directions, or by unimportant omissions or defects in the particulars of information specified in Sec. 14.

If the Certificate of Registration be not forthcoming, the fact of incorporation may be proved *aliunde*. *In re Alliance Financial Corporation: Blaney's Case.* O.C.J. 106

3. In a suit brought by a transferee of shares in a joint stock banking company, formed after the passing of Act VII. of 1860, and neither incoporated nor registered when the plaint was filed, to compel the directors, trustees, and public officer of the Company to give up the share certificates which had come into the possession of the bank, or to pay damages to the plaintiff:—

Held (by *Couch*, C.J., and *Sargent*, J., affirming, in appeal, the decree, of *Arnould*, J.) that, the company being illegal, under Sec. 2 of Act XIX. of 1857, the suit was not maintainable. *Mánekji Sorábjí* v. *C. N. Cama and others.* O.C.J. 159

INDIAN COMPANIES' ACT, 1866—

SEC. 24. O.C.J. 133

SEC. 34. O.C.J. 124

SEC. 108. O.C.J. 28, 29, 30

SEC. 193. O.C.J. 121

SEC. 211. O.C.J. 28, 29

SEC. 212. O.C.J. 28, 29, 30

SEC 219. O.C.J. 48*n*

SEC. 220. O.C.J. 47, 48*n*

REGULATIONS, CL. 27. O.C.J. 18

INDIAN PENAL CODE.—*See* JURY, SEPARATION OF.

SEC. 30. CR.CA. 28

SEC. 52. A.C.J. 43

SEC. 62. CR.CA. 20, 23, 24

SEC. 107. CR.CA. 56

SEC. 177. CR.CA. 43

SEC. 188.—*See* PUBLIC SERVANT, DISOBEYING ORDER OF. SENTENCE, ALTERATION OF.

SEC. 211.—*See* FALSE CHARGE.

SEC. 321. CR.CA. 43

SEC. 341. CR.CA. 3

SEC. 379. CR.CA. 29, 38

SEC. 383.—*See* EXTORTION.

SEC. 384. CR.CA. 47

SEC. 409.—*See* CRIMINAL PROCEDURE CODE, SEC. 373.

SEC. 415. CR.CA. 43

SEC. 416.—*See* CRIMINAL PROCEDURE CODE, SEC. 426.

SEC. 417. CR. CA. 42

SEC. 442. CR. CA. 39

SEC. 448.—*See* GOOD BEHAVIOUR. CR. CA. 3

SEC. 457. CR. CA. 37

SEC. 467.—*See* JURY, SEPARATION OF. CR. CA. 23, 28, 56

SEC. 471. CR. CA. 56

SEC. 511. CR. CA. 37*n*

INDIAN POST OFFICE ACT, 1866. —*See* ACT XVII. OF 1854.

INDIAN REGISTRATION ACT, 1866—

1. SECS. 44, 45, 46, 65, and 77—

A Testator deposited his Will in a sealed cover with the Registrar of Assurances at Bombay, under Sec. 44 of Act XX. of 1866; and upon his death his executors applied to the Registrar to deliver over to them the Will, in order to enable them to apply to the High Court for Probate thereof. The Registrar gave a copy of the Will, under Sec. 46 of the Act; but refused to part with the original.

On application by the executors for a citation to the Registrar General, to bring the Will into court, and deposit it with the Ecclesiastical Registrar:—

Held that the original should be brought into Court, where alone the *factum* of the Will could be tried and determined; and that a copy, authenticated under Sec. 65 of the Act, was not sufficient.

The Registrar General should not, after the death of the depositor of a Will, part with it otherwise than by order of Court. *In the Goods of Nagindás (Deceased).* O.C.J. 135

2. *Held* that there was no appeal to the High Court from the decision of a District Court on a petition, under Sec. 84 of Act XX. of 1866, to establish the right to have a document registered; nor would the Court interfere with such a decision, under Reg. II. of 1827, Sec. 7, Cl. 2. *Ex parte Dharamdás Bhagvándás.* A.C.J. 104

INFORMATION.—*See* FALSE IMPRISONMENT.

IN GOOD FAITH.—*See* ACT XVIII. OF 1850, 2. FALSE IMPRISONMENT.

INHERITANCE.—*See* REUNION.

INNKEEPER AND GUEST—

In a suit brought to recover the value of certain articles stolen from the plaintiff's rooms at an hotel in Bombay; the defendant being the licensed proprietor of the hotel, who was in the habit of entertaining, for shorter or longer periods, all comers willing to pay the usual charges; and the plaintiff being an exchange broker doing business in Bombay, who had lived at the hotel for more than a year, paying for his board and lodging, at first by the day, and afterwards, by agreement, *at the rate of* so much a month—but neither was the plaintiff under any obligation to remain, nor the defendant to accommodate him, for any fixed time:—

Held that the relation of innkeeper and guest (and not that of boarding-house-keeper and lodger) subsisted between the parties; and that the defendant was, *primâ facie* and without proof of actual negligence, liable to make good the loss sustained by the plaintiff.

There is no law but the Commom Law of England to regulate the relation of innkeeper and guest in Bombay, in a case between a European and a Pársi. *Whately* v. *Pálanji Pestanji.* O.C.J. 137

INSOLVENT COURT RULES—

Held that Rule 14 of the Insolvent Court at Bombay—requiring a special application, on affidavit, and notice to opposing creditors, before

a fresh petition can be filed—has reference to a dismissal upon hearing; and not to the case of a petition dismissed under Rule 10. *In re Mánekji Frámji, an Insolvent* O.C.J. 167

INTENT TO INJURE.—*See* FALSE CHARGE.

INTENTION TO EVADE PAYMENT OF STAMP DUTY.—*See* APPEAL;—STAMP.

INTEREST.—*See* SEPARATE SUIT.

INTEREST, HINDU' LAW—

1. By the Hindú Law, interest exceeding in amount the principal sum cannot be recovered *at any one time.*

2. Act XXVIII. of 1865 has not, by repealing Sec. 12 of Reg. V. of 1827, or otherwise, altered this rule of the Hindú law. *Khushálchand Lálchand* v. *Ichhárám Fakír; Rámkrishnabhat* v. *Vithoba bin Malhári.* A.C.J. 23

INTERPRETATION.—*See* CONSTRUCTION. CR.CA. 41

INVENTORY.—*See* ACT XX. OF 1864.

IRREGULAR ORDER.—*See* PENAL RECOGNISANCE TO KEEP THE PEACE.

IRREGULAR PROCEDURE.—*See* ACT XXXVI. OF 1860.

IRREGULAR SENTENCE. — *See* GOOD BEHAVIOUR, SECURITY FOR.

IRREGULARITY.—*See* CRIM. PROC. CODE, SEC. 373.

IRREGULARITY, OBJECTIONS FOR.—*See* SETTING ASIDE, 2.

JAILER. CR.CA. 52.

JAIL, SUPERINTENDENT OF. CR.CA. 52

JOINT FAMILY.—*See* POSSESSION FOR THIRTY YEARS, 2, 3.

JOINT PURCHASE BY DIRECTORS.—*See* SHARES, SALE OF, 5.

JUDGE'S NOTES.—*See* APPEAL; RULES OF COURT.

JUDGMENT BY DEFAULT—

On appeal from the rejection of an application made, under Sec. 119 of Act VIII. of 1859, to set aside a judgment by default:—

Held that, in order to satisfy the Court "that the plaintiff was prevented by any sufficient cause from appearing," it was enough to show that there had been a *bonâ fide* mistake, which was not unreasonable. *Hardatrái Shrikisandás* v. *Victoria Finance and Bullion Association.* O.C.J. 60

JUDICIAL OFFICERS.—*See* ACT XVIII. OF 1850, 1.

JUDICIAL PROCESS.—*See* CERTIFICATE OF SALE.

JURISDICTION.—*See* ACT XXXV. OF 1850, 1. ACT XVII. OF 1854. ACT XVIII. OF 1854, 1, 2. ACT (BOMBAY) No. IX. OF 1863. DISPOSSESSION OF IMMOVEABLE PROPERTY. FALSE IMPRISONMENT. HINDU' TEMPLE, ENDOWMENT OF. INDIAN REGISTRATION ACT, 1866, 1. OPIUM, ILLEGAL POSSESSION OF. OPIUM, RETAILING WITHOUT LICENSE. PUBLIC SERVANT, DISOBEYING ORDER OF. TOWN RULE, PENALTY FOR BREACH OF.

JURORS.—*See* JURY, TRIAL BY.

JURY, SEPARATION OF—

By the practice of the Supreme Court at Bombay before the Indian Penal Code came into operation, on a trial for treason or felony the jury (as in England) was kept together during the night, under the charge of officers of the Court; but on a trial for misdemeanour it was in the discretion of the Judge whether they should be kept together, or allowed to return to their homes for the night, the latter being generally done; and after the Code came into operation, the practice continued the same, as well in the Supreme Court, as subsequently in the High Court;—the Judges applying the Rule by determining whether the offence under trial would by the old law have been a felony or a misdemeanour.

Where the Judge, on a charge under Sec. 467 of the Indian Penal Code, permitted the jury to separate on the first day of the trial and before verdict:—

Held that the exercise of his discretion was not a matter to be reviewed by the High Court under Sec. 26 of the Letters Patent, there being no error in any point of law; as the offence charged was only a misdemeanour under the law in force before the Indian Penal Code took effect. *Reg.* v. *Dayál Jairáj and others.* CR. CA. 20

JURY, TRIAL BY—

Held that it was not necessary, in a trial by jury before a Court of Session, under the provisions of the Code of Criminal Procedure, that the jurors should be sworn. *Reg.* v. *Lakshuman Rámchandra and others.* CR. CA. 56

JUST AND LAWFUL GROUND.—*See* FALSE CHARGE.

KHOTI' TENURE—

In a suit brought by a khot, in 1862, to recover an hereditary share in a khotí village, which had been mortgaged by her husband in 1845, and taken directly under Government management by the Sub-Collector of Kulábá, on failure by the mortgagee to pass the customary agreement (*kabuláyat*) for the security of the revenue for the year 1851-52, the court of first intance decreed the restoration of the khotí estate, on payment by the plaintiff of any loss which may have been sustained by Government during its interim management, but the District Judge in appeal, modified that decree by annexing a condition, that the plaintiff was to observe the engagements which had been entered into between Government and the subtenants of the estate, through the Revenue Survey—which had been introduced during the direct management of the village by Government—whether as regards the rates of assessment, or the rights of tenancy:—

Held by Arnould and Newton, JJ., (*Tucker, J., dissentiente*) that the plaintiff had no right to object to the conditions, subject to which the

District Judge had allowed her claim to resume the khotship. *Tájubai* v. *The Sub-Collector of Kulábá.* A.C.J. 132

LACHES.—*See* ACT XXVIII. OF 1865. SHARES, SALE OF, 5. O.C.J. 123

LAND, SUIT RELATING TO.—*See* DOCUMENT, DESTRUCTION OF BY PARTY.

LAPSE OF TIME.—*See* ACQUIESCENCE.

LAW ALTERED, WHILE SUIT PENDING.—*See* INDIAN COMPANIES' ACTS, 1.

LAWFUL EXCUSE.—*See* FALSE IMPRISONMENT.

LEASE.—*See* YEARLY TENANT.

LETTERS OF ALLOTMENT.—*See* SHARES, SALE OF, 1, 6.

LETTERS PATENT.—*See* APPEAL. JURY, SEPARATION OF.

LIABILITY OF COMPANY FOR ACTS OF DIRECTORS.—*See* SHARES, SALE OF, 1.

LIABILITY OF PERSON OR FUND.—*See* DEBTOR AND CREDITOR.

LICENSE.—*See* OPIUM, RETAILING WITHOUT LICENSE.

LIMITATION.—*See* ACT XIV. OF 1859, SECS. XX. AND XXI. YEARLY TENANT.

LIMITATION, DEFENCE OF—

In a suit for an account where the defendant, while alleging the balance to be in her favour, contended that the plaintiff's claim was barred by the Limitation Act; and the accounts were afterwards referred by consent to the Commissioner, who refused, without special direction, to notice the defence of limitation; and the Judge of the Division Court amended the order of reference, by directing the Commissioner to investigate the accounts with reference to the operation of the Act:—

Held, on appeal (by *Couch*, C.J., and *Westropp*, J.), that the order of amendment was justified by the circumstances of the case; and that the defendant having raised the defence of limitation, and not having subsequently abandoned it, that question should be first decided. *Pírbhái Rávji and another* v. *Nenbiá.* O.C.J. 164

LODGER.—*See* INNKEEPER AND GUEST.

LOSS.—*See* CRIM. PROC. CODE, SEC. 44. MARINE INSURANCE.

MAGISTRATE.—*See* FALSE IMPRISONMENT. GOOD BEHAVIOUR, SECURITY FOR. OPIUM, ILLEGAL POSSESSION OF. PARDON, TENDER OF. PENAL RECOGNISANCE TO KEEP THE PEACE.

MAGISTRATE OF THE DISTRICT.

1. Government may by proclamation declare and direct that an Assistant Collector in charge of the collectorate during the absence of the Collector shall be, during that period, "the chief officer charged with the executive administration of the District in Criminal matters;" and such officer, being, within the meaning of Sec. 14 of the Crim. Pro. Code, "the Magistrate of the District," may hear appeals

from Subordinate Magistrates, under Sec. 412 of the Code. *Reg.* v. *Bháishankar Harirám.* CR. CA. 18

2. On a reference by a Session Judge, Circulars issued by a District Magistrate—forbidding all the Subordinate Magistrates from taking up cases, if they think they shall have to act under the provisions of Sec. 277 of the Crim. Proc. Code—annulled, as beyond the competence of the District Magistrate, and based on a misunderstanding of Sec. 277. *Reg.* v. *Ganu bin Ragnák and others.* CR.CA. 29

See PENAL RECOGNISANCE TO KEEP THE PEACE.

MAGISTRATE OF ZILLAH.—*See* ACT XXXV. OF 1850, 1.

MAHA'JAN.—*See* MARINE INSURANCE.

MAMLATDA'R.—*See* PUBLIC SERVANT, DISOBEYING ORDER OF.

MANAGEMENT—*See* KHOTI' TENURE.

MANAGER. — *See* SHARES, SALE OF, 5.

MARINE INSURANCE—

In a suit on a policy of insurance, as for a total loss, where goods were shipped for the voyage from Súrat to Karáchi, and the vessel, having sprung a leak, was forced to put into Dwárká, at which place the goods (with the exception of some iron thrown overboard during the voyage) were landed and placed in a warehouse, from which a portion (some castor oil and jágari) was carried off by robbers; and the larger residue of the cargo—consisting principally of cotton seeds, which were dried and cleaned—was sold; and the proceeds, after deducting freight expenses, remained in the hands of the Mahájans of Beyt, to be paid to whomsoever might be entitled to them :—

Held: 1*st*—That the loss by robbers, although not expressly mentioned in the Policy, was one of the perils insured against.

2*nd*—That the Judge below, being erroneously of opinion that, when the goods were once landed damaged, there was nothing to do but to sell everything for the benefit of the underwriters; and having, consequently, recorded no finding on the material question, whether the whole or any part of the cargo was practically capable of being sent in a marketable state to the port of destination;—the suit must be remanded in order that the Judge may determine, whether there was a constructive total loss, which entitled the plaintiffs to abandon; and, if not, that he may award such a proportion of the value of the iron and of the jágari and oil which were actually lost, and of the amount of the deterioration in the cotton seeds and other articles, as the sum insured by the defendant bore to the whole sum insured, taking into account, also, in that case, what proportion the sum insured bore to the actual value of the goods. *Dwárkádás Lalubhái* v. *A'dam Alí Sultán Alí.* A.C.J. 1

MARKETABLE STATE.—*See* MARINE INSURANCE.

MARRIAGES.—*See* ACT XV. OF 1865.

MASTER AND SERVANT.—*See* FALSE IMPRISONMENT.

MATERIAL IRREGULARITIES.—*See* SETTING ASIDE, 2.

MATERIAL QUESTION.—*See* MARINE INSURANCE. REMAND, 2.

MATERIAL WITNESS.—*See* POSTPONEMENT OF TRIAL.

MAXIMS—

In jure, non remota causa, sed proxima spectatur. A.C.J. 3

In pari delicto melior est conditio possidentis. O.C.J. 161

Modus et conventio vincunt legem. A.C.J. 18

Nemo ex suo delicto meliorem suam conditionem facere potest. A.C.J. 123*n*

Nullus commodum capere potest de injuriâ suâ propriâ. A.C.J. 123*n*

Omnia præsumuntur contra spoliatorem. A.C.J. 116

Omnia præsumuntur ritè et solenniter acta. A.C.J. 41

Pacta quæ turpem causam continent non sunt observanda. O.C.J. 16

Pactis privatorum juri publico non derogatur. A.C.J. 18

Respondeat superior. A.C.J. 42

MEMORANDUM OF ASSOCIATION.—*See* SHARES, SALE OF, 1.

MESNE PROFITS.—*See* SEPARATE SUIT.

MISAPPREHENSION. — *See* POSTPONEMENT OF TRIAL.

MISBEHAVIOUR. — *See* FALSE IMPRISONMENT.

MISDEMEANOUR.—*See* JURY, SEPARATION OF.

MISREPRESENTATION.—*See* MORTGAGE.

MISTAKE IN COPYING ACT.—*See* ACT XX. OF 1864.

MISTAKE OF DISTRICT JUDGE.—*See* REMAND, 1.

MORTGAGE—

Where money-lenders, dealing with ignorant, illiterate peasants, made use of the necessities of the position of those peasants, who were seeking to raise a sum of money for the purpose of stocking and tilling their lands, to impose upon them a contract in the form of a mortgage, by which they agreed, in default of punctuality of payment of the half-produce, and in other events, to sell their land at a gross undervalue, viz., one-third of the amount of the mortgage debt, which in itself was not more than equal to half the value of the annual produce of the land, and to remain liable to the remaining two-thirds of that debt with interest; and, even if no default should occur on their parts in payment of a moiety of the annual produce, or the performance of their other covenants, and notwithstanding full payment of the principal, to continue for fifteen years to pay the half-produce of the lands to the mortgagees :—

Held (reversing the decrees of both the Courts below) that the deed of mortgage should only stand as security for the payment of the principal sum of Rs. 300 and interest at nine per cent.; and in all other respects should be set aside as inequitable, fraudulent, and grossly oppressive.

Held, also, that if, in execution of the reversed decrees, the lands had been made over to the mortgagees as purchasers, they should be restored to the mortgagors, and that the rents, profits, and produce received by the mortgagees while in possession, should be set off on account against the said principal sum and interest, and that the balance should be paid by the party against whom the same might be found.

Mere inadequacy of consideration, unless it be so great as to amount to evidence of fraud, is not sufficient ground for setting aside a contract, or refusing to decree specific performance of it. But inadequacy of consideration, when found in conjunction with any such other circumstances as suppression of true value of property, misrepresentation, fraud, surprise, oppression, urgent necessity for money, weakness of understanding, or even ignorance, is an ingredient which weighs powerfully with a Court of Equity in considering whether it should set aside contracts, or refuse to decree specific performance of them.

As to the validity of a mortgage of future crops—*Quære. Kedári Rányu and another* v. *Átmárámbhat and another*. A.C.J. 11

See ACT XXVIII. OF 1865. KHOTÍ' TENURE. REMAND, 2.

MUTUAL DEALINGS—*See* ACT XIV. OF 1859, SEC. VIII.

NATURE OF INSTRUMENT.—*See* STAMP.

NECESSITY FOR MONEY.—*See* MORTGAGE.

NEW EVIDENCE, DISCOVERY OF.—*See* POSSESSION FOR THIRTY YEARS, 1.

NON-ACCEPTANCE.—*See* SHARES, SALE OF, 2, 4.

NON-DIVISIBILITY.—*See* HINDU' TEMPLE, ENDOWMENT OF.

NON-PAYMENT OF CALL.—*See* SHARES, SALE OF, 1.

NON-PRODUCTION.—*See* ACT XIV. of 1859, SEC. VIII.

NOTICE TO PAY CALL.—*See* SHARES, SALE OF, 5.

OMISSION OF FORMALITIES.—*See* SHARES, SALE OF, 5.

OMISSION TO TRY ISSUE.—*See* SHARES, SALE OF, 4.

OPIUM, RETAILING WITHOUT LICENSE—

A conviction and sentence by a Full Power Magistrate for breach of the rules for the retail sale of opium, under Reg. XXI. of 1827, Sec. 10, annulled for want of jurisdiction: as "the Zillah Magistrate" alone was empowered to enforce the penalty. *Reg.* v. *Sidu valad Pavádi*. CR. CA. 39

OPIUM, ILLEGAL POSSESSION OF—

A conviction and sentence by a Magistrate F. P., under Reg. XXI. of

1827, Sec. x., Cl. 4, annulled for want of jurisdiction ; the "Zillah" (*i.e.*, District) Magistrate only being empowered by the Regulation to enforce the penalty. *Reg.* v. *Gaṇiá bin Bápu.* CR. CA. 50

OPPOSING CREDITOR.—*See* INSOLVENT COURT, RULES OF.

OPPRESSION.—*See* MORTGAGE.

OPTION OF SHAREHOLDERS.—*See* SHARES, SALE OF, 2.

ORDER OF REFERENCE. — *See* LIMITATION, DEFENCE OF.

PARDON, TENDER OF—

On a reference by a Session Judge, where certain persons were found guilty of gaming by a Full Power Magistrate, solely on the evidence of a person supposed to have been concerned in the offence, whom the Magistrate had pardoned :—

Held that a Magistrate has no power to tender a pardon in a case which he tries himself; but only, under Sec. 209 of the Crim. Proc. Code, in the case of an offence triable by the Court of Session. *Reg.* v. *Remedios and others.* CR. CA. 59

PA'RSI.—*See* INNKEEPER AND GUEST. ACT XV. OF 1865.

PA'RSI MARRIAGES—*See* ACT XV. OF 1865.

PARTIES.—*See* SETTING ASIDE, 1.

PARTITION.—*See* REUNION. TESTAMENTARY POWER, HINDU' LAW.

PARTITION, EVIDENCE OF.—*See* HINDU' FAMILY.

PARTNERS.—*See* INDIAN COMPANIES' ACTS, 3.

PENAL RECOGNISANCE TO KEEP THE PEACE—

There is no appeal to the Court of Session from an order made by a Magistrate, under Sec. 409 of the Crim. Proc. Code, requiring a penal recognisance to keep the peace under Sec. 280.

The Court of Session may, however, in such case, under Sec. 434 of the Code, call for and examine the record of the Court below ; and, if it shall be of opinion that the order of the Magistrate is contrary to law, refer the proceedings for the orders of the High Court.

There is no provision of the Crim. Proc. Code which makes it lawful for a Court of Session to call for and examine the record of a case tried by a Sub-Magistrate, where no sentence or order has been passed thereon by the *immediately* subordinate Court of the Magistrate.

A conviction of house-trespass by a Subordinate Magistrate was reversed, on appeal, by the Magistrate of the District, who, moreover, directed the Subordinate Magistrate to take a recognisance bond in the sum of Rs. 50 from the accused, that he would not, for one year, enter the house, and would not commit a breach of the peace :—

Held by the High Court that the order directing the recognisance bond to be taken should be set aside, as having been improperly made by the Magistrate in the absence of the accused, and upon the suggestion of his adversary.

Semble the order was also illegal, as not authorised by Sec. 280, or any other section of the Code of Criminal Procedure. *Reg* v. *Bhúskar K. Khárkar.* CR. CA. 1

PERILS INSURED AGAINST.—*See* MARINE INSURANCE.

PERPETUAL LEASE.—*See* INA'M-DA'R.

PESHWA'S GOVERNMENT.—*See* POSSESSION FOR THIRTY YEARS, 1.

PETITION.—*See* INSOLVENT COURT RULES.

PETTY OFFENCES. — *See* ACT XVIII. OF 1854, 2.

PORT OF DESTINATION.—*See* MARINE INSURANCE.

POSSESSION.—*See* YEARLY TENANT.

POSSESSION AS PROPRIETOR.—*See* POSSESSION FOR THIRTY YEARS, 1, 2, 3.

POSSESSION FOR THIRTY YEARS OF IMMOVEABLE PROPERTY—

1. The plaintiffs' ancestors having been declared by a decree of the Peshwá's Government, in A. D. 1722, to be entitled to the whole of the *Pátilkí watan* of Pánḍerái; and the defendants having produced a *watanpatra* from the Rájá of Sátárá, in A. D. 1742, in favour of their claim to a half-share, but being unable to show that their ancestors had any concern with the *watan* for a period of ninety-six years subsequent thereto—during which the plaintiffs' ancestors were recognised as the sole owners:—

Held that the District Judge did not act contrary to law in throwing upon the defendants the burden of proving possession as proprietors for more than thirty years without interruption before the institution of the suit.

A rule to show cause why the decree of the High Court should not be reviewed, on the ground of the discovery of new evidence, was discharged; as the applicants failed to show that the document brought forward was admissible as evidence, and that it was not within their knowledge, or could not be adduced by them at the time when such decree was passed. *Kokḍi* v. *Jagtap.* A. C. J. 49

2. In a suit brought to recover a share in land alleged to be joint family property, where the defendants pleaded possession as proprietors for more than thirty years:—

Held that it was not necessary that actual separation should be proved; but that it was enough to show that the defendants had been in uninterrupted possession for more than thirty years. *Gurávi* v. *Gurávi.* A.C.J. 170

3. In a suit brought for a share in an hereditary family allowance, where the defendants pleaded possession for more than thirty years:—

Held that the lower appellate court was in error in holding that, "if a claimant is proved to be one of the *bhaúband* of the defendants, no lapse of time, since the active enjoyment of the privileges, would bar his claim to such a share as he would be entitled to."

S. A. No. 4268, 7 Bom. S. D. A. Dec. 372, followed. *Ráṇe* v. *Ráṇe.* A.C.J. 173

POSSESSION OF LAND.—*See* ACQUIESCENCE.

POST OFFICE.—*See* ACT XVII. OF 1854.

POSTPONEMENT OF TRIAL—

The plaintiffs' attorney being under the misapprehension that one of the plaintiffs—who was a material witness—was in Bombay, when in fact he was in England, and an application to consent to a commission have been made to the defendant's attorney and refused on the eve of the hearing;—an application was made to the Judge in chambers, on the morning of the day fixed for the hearing, and supported by an affidavit, for the issuing of a commission and for an adjournment of the suit; and the Judge declining to make an order in chambers, the application was renewed in court, when the Judge refused to take notice of what had occurred before himself in chambers, and made a note that the application for a commission was made upon no affidavit; and as the affidavit (presented in chambers) had been sent to the office of the plaintiffs' attorneys, for a copy to be made and served upon the defendant, and was not then in court, the application for a commission and to adjourn the hearing was refused; and plaintiffs' counsel not being instructed to proceed with the hearing, and leave to withdraw the suit having been also refused, the suit was dismissed:—

Held that the Judge was wrong in refusing to postpone the case for the production of the affidavit in court; and that there was no legal ground whatever for the refusal to withdraw the suit, which was accordingly restored to its place in the list, and remanded in order to be tried. *Dádábhái Naoroji & Co.* v. *Sorábji Cawasji.* O.C.J. 55

PRACTICE.—*See* ACCOMPLICE. ACT XXVIII. OF 1865. BOOKS OF ACCOUNT. INSOLVENT COURT RULES.

PRACTICE OF HIGH COURT.—*See* ACT XXVIII. OF 1865.

PREVIOUS CONVICTION.—*See* ACT VI. OF 1864, 2.

PRIMA FACIE CASE.—*See* ACT XIV. OF 1859, SEC. VIII.

PRINCIPAL SUM.—*See* INTEREST, HINDU' LAW.

PRIORITY.—*See* CERTIFICATE OF SALE.

PRISONER.—*See* CRIM. PROC. CODE, SEC. 373.

PROBATE.—*See* INDIAN REGISTRATION ACT, 1866, 1.

PROCEDURE.—*See* APPEAL;—LETTERS PATENT.

PROCLAMATION BY GOVERNMENT.—*See* MAGISTRATE OF THE DISTRICT, 1.

PROMISSORY NOTE PAYABLE ON DEMAND.—*See* SHARES, SALE OF, 2.

PROPERTY HELD IN SEVERALTY.—*See* TESTAMENTARY POWER, HINDU' LAW.

PROPERTY, SELF-ACQUIRED.—*See* TESTAMENTARY POWER, HINDU' LAW.

PROTECTION OF JUDICIAL OFFICERS.—*See* ACT XVIII. OF 1850, 1.

PUBLIC SERVANT, DISOBEYING ORDER OF—

Convictions and sentences for disobeying an order duly promulgated by a public servant, reversed; as the Mámlatdár, who stated that he proceeded under Bombay Act No. V. of 1864, was not thereby empowered to make the order. *Reg.* v. *Bháú bin Vithu and another.* CR. CA. 53

PUBLISHING AND CONDUCTING SALE.—*See* SETTING ASIDE, 2.

RAILWAYS.—*See* ACT XVIII. OF 1854, 1, 2

RATES OF ASSESSMENT.—*See* KHOTÍ' TENURE.

READINESS AND WILLINGNESS.—*See* SHARES, SALE OF, 3, 4.

"REASONABLY, CAREFULLLY, AND CIRCUMSPECTLY."—*See* FALSE IMPRISONMENT.

RECEIPT OF RENT.—*See* ACQUIESCENCE.

RECTIFICATION OF REGISTER. O.C.J. 124

REDEMPTION.—*See* REMAND, 2.

REFERENCE.—*See* PENAL RECOGNISANCE TO KEEP THE PEACE.

REGISTER OF SHAREHOLDERS.—*See* INDIAN COMPANIES' ACTS, 2. SHARES, SALE OF, 3.

REGISTRAR GENERAL.—*See* INDIAN REGISTRATION ACT, 1866, 1.

REGISTRATION.—*See* CERTIFICATE OF SALE, INDIAN COMPANIES' ACTS, 1.

REGISTRATION OF COMPANY.—*See* INDIAN COMPANIES' ACTS, 2.

REGULATIONS (BOMBAY)—

No. I. OF 1808, SEC. XVIII., CL. 2, and SEC. XX. A.C.J. 148, 159

No. I. OF 1814.—*See* FALSE IMPRISONMENT. APPX. 4, 5, 15, 16, 18, 19, 22, 25, 26, 27

No. II. OF 1827. SEC. V., CL. 2,—*See* INDIAN REGISTRATION ACT, 1866, 2.

No. III. OF 1827.—*See* CERTIFICATE OF SALE.

SECS. IX. and XI. A.C.J. 169

No. IV. OF 1827,

SEC. XXVI., CL. 2. A.C.J. 115

No. V. OF 1827—

SEC. I.—*See* POSSESSION FOR THIRTY YEARS, 1, 2, 3.

SEC. IV. A.C.J. 59

SEC. XII.—*See* INTEREST, HINDU' LAW.

No. IX. OF 1827. SEC. III., CL. 2.—*See* CERTIFICATE OF SALE.

No. XI. OF 1827, SEC. VI. A.C.J. 168

No. XII. OF 1827.—*See* ACT XXXV. of 1850, 1. CR. CA. 12

SECS. 5 and 41.—*See* ACT XVIII. OF 1854, 2.

No. XVI. OF 1827, SEC. XX.—*See* ACT XI. OF 1843.

SEC. XX., CL. 2. A.C.J. 130

No. XVII. OF 1827.—*See* KHOTÍ' TENURE.

SECS. III. and VI. A.C.J. 141

SEC. VIII. A.C.J. 133, 147, 155

SEC. IX., CL. 5. A.C.J. 133

CHAP. VI. A.C.J. 147

CHAP. VIII.—*See* DISPOSSESSION OF IMMOVEABLE PROPERTY. A.C.J. 109

No. XVIII. OF 1827.—*See* STAMPING. A.C.J. 93

No. XXI. of 1827—

Sec. vii., Cl. 1. cr. ca. 39 *n.*

Sec. x.—*See* Opium, Retailing without License.

Sec. x., Cl. 4.—*See* Opium, Illegal Possession of.

Nos. V. and VI. of 1830. a.c.j. 109

REJECTION OF DOCUMENT.—*See* Appeal, Stamp.

REJECTION OF PLAINT.—*See* Act XVIII. of 1850. Act XV. of 1865.

RELIGIOUS ENDOWMENT.—*See* Hindu' Temple, Endowment of. Remand, 2.

REMAND—

1. An Acting District Judge, having made a decree, reversing the decree of the Munsif, who threw out the plaintiff's claim, omitted to pass a decree himself in favour of the plaintiff, which his finding showed he intended to do: the case was remanded, on special appeal, by the High Court to the District Court, with an order that a decree should be passed; but the District Judge (who had meanwhile returned to his appointment) re-opened the whole case, and passed a decree directly opposed to that of his predecessor, in which he confirmed the Munsif's decree:—

Held that the decree of the Judge should be reversed, and the suit again remanded, in order that he might pass a decree for the plaintiff, in accordance with the view of the case expressed by the Acting Judge, with which the High Court saw no ground, upon the special appeal before it, to interfere. *Bábái bin Rámji* v. *Kásimbhái valad A'zambhái and others.* a.c.j. 60

2. In a suit brought by A to recover a half-share in certain ancestral land which he claimed, first by right of inheritance, and secondly under a deed of settlement executed by the other half-sharer, B, since deceased, the widow of B answered that the whole of the land had been assigned for the support of a mosque by B's father; and the lower appellate court found that it was so, and reversed the decree of the Munsif, who had allowed A's claim:—

Held, on special appeal (No. 115 of 1865), that the document relied upon as creating an endowment had been improperly admitted in evidence; it being only a copy, and the absence of the original not having been accounted for; the Court further observing that the document only purported to be a mortgage, and did not create any religious endowment.

3. And, on the suit being remanded, the lower appellate court found no reason to alter its former decree; the absence of the original mortgage deed, executed in a.d. 1834, having been accounted for; and a second deed, bearing date a.d. 1846, having been produced, by which B's father assigned the whole of the land in dispute to the *jamát* of the community, as trustees of religious property:—

Held, on a second special appeal (No. 840 of 1865), that the deed of 1846, being unstamped, was in-

admissible in evidence, and that the deed of 1834 being only a mortgage, the equity of redemption was not lost, notwithstanding the failure of the condition that the property was to be considered as sold if the mortgage debt was not paid before A.D. 1846.

Rámji v. *Chinto*, 1 Bom. H. C. Rep. 119, followed.

The Court also, finding that the lower appellate court had not determined material questions of law and fact necessary for the decision of the suit, framed certain issues for its guidance, and again remanded the case. *Muhamnad valad A'bdul Mulná* v. *Ibrahim valad Hasan and others.* A.C.J. 160

See MARINE INSURANCE. SHARES, SALE OF, 4. VENDOR'S LIEN FOR UNPAID PURCHASE-MONEY.

RPEEAL. — *See* INDIAN COMPANIES' ACTS, 1.

RE-PURCHASE FOR FUTURE DELIVERY. — *See* SHARES, SALE OF, 1.

RESERVATION.—*See* APPEAL.

RESPONDENT'S OBJECTIONS.—*See* APPEAL, ABATEMENT OF.

RESTORATION OF SUIT.—*See* DOCUMENT, PRODUCTION OF, WHEN PLAINT IS PRESENTED.

RESUMPTION. — *See* KHOTI' TENURE.

REUNION—

Held that reunion must be made by the parties, or some of them, who made the separation If any of their descendants think fit to unite, they may do so; but such a union is not reunion in the sense of the Hindú law, and does not affect the inheritance. *Vishvanáth Gangádhar* v. *Krishnáji Ganesh and others.* A.C.J. 169

REVNUE COURTS.—*See* DISPOSSESSION OF IMMOVEABLE PROPERTY.

REVENUE SURVEY.—*See* KHOTI' TENURE.

REVIEW.—*See* POSSESSION FOR THIRTY YEARS, 1.

RIGHTS OF TENANCY.—*See* KHOTI' TENURE.

RIGHT TO HAVE DOCUMENT REGISTERED.—*See* INDIAN REGISTRATION ACT, 18, 662.

ROBBERS.—*See* MARINE INSURANCE.

RULES.—*See* APPEAL;—RULES OF COURT, 1, 2. INSOLVENT COURT RULES. O.C.J. 65*n*

SALE BY AUCTION.—*See* SETTING ASIDE, 2.

SAMSRISHTA.—*See* REUNION.

SANAD.—*See* DOCUMENT, DESTRUCTION OF BY PARTY.

SA'TA'RA', RA'JA' OF.—*See* POSSESSION FOR THIRTY YEARS, 1.

SCOPE OF AUTHORITY. — *See* SHARES, SALE OF, 1.

SCRIP.—*See* SHARES, SALE OF, 6.

SECONDARY EVIDENCE.—*See* REMAND, 2.

SECURITY FOR COSTS.—*See* APPEAL;—RULES OF COURT.

SEIZURE.—*See* BOOKS OF ACCOUNT.

SEIZURE AND SALE.—*See* ACT XXVIII. OF 1865.

"SELL."—*See* BUILDING-SITE, RENT-FREE GRANT OF.

SENTENCE.—*See* GOOD BEHAVIOUR, SECURITY FOR.

SENTENCE, ILLEGAL ALTERATION OF—

A sentence of *rigorous* imprisonment passed by a Magistrate F. P., under Sec. 188 of the Indian Penal Code, for disobedience to an order duly promulgated by a public servant, altered to one of *simple* imprisomnent; as the Magistrate's finding did not show that the case came within the latter part of the section, in which case alone the infliction of rigorous imprisonment was authorised. *Reg.* v. *Ratanráv M. Chaván.* CR. CA. 32

SEPARATE APPEAL.—*See* APPEAL, ABATEMENT OF.

SEPARATE HOUSE ACCOMMODATION.—*See* HINDU' FAMILY.

SEPARATE IN ESTATE.—*See* HINDU' FAMILY.

SEPARATE IN FOOD AND WORSHIP.—*See* HINDU' FAMILY.

SEPARATE PROPERTY.—*See* TESTAMENTARY POWER: HINDU' LAW.

SEPARATE SUIT.—

Held, under Sec. 11 of Act XXIII. of 1861, that a separate suit could not be maintained to recover mesne profits or interest, payable in respect of the subject-matter of a suit between the date of the institution of the suit and the execution of the decree; but that all questions relating thereto ought to be urged before, and be determined by, the court executing the decree passed in such suit. *Jivá Pátil Rahimná* v. *Malukji M. Nathuná and others.* A.C.J. 31

[Overruled in *Rádhábai kom Dámodhar v. Rádhábai kom Krishnanáth,* decided 10th December 1867, and to be reported.—ED.]

SEPARATION.—*See* POSSESSION FOR THIRTY YEARS, 2. REUNION.

SERVANT.—*See* FALSE IMPRISONMENT.

SERVICE LAND.—*See* ACT XI. OF 1843. DOCUMENT, DESTRUCTION OF BY PARTY.

SET-OFF ON ACCOUNT.—*See* MORTGAGE.

SETTING ASIDE—

1. D. M. brought a suit against C.D., described as the heir of D.V., and in 1838 obtained a decree to be satisfied out of the estate of D.V. In 1862 the executors of D. M.'s will applied to the Munsif's Court to have the decree executed against the estate of D. V., which was then in the possession of R. and others, C. D. having died; and R. and others resisted the application on the ground that C.D., who alone had been made defendant in the suit, was not the heir of D. V. The Munsif rejected the application; but his order was reversed on appeal by the District Judge:—

Held that the Judge's order must be set aside, on the grounds that C.D. was not the heir of D. V.; that neither he, nor his guardian on his account, was, at the date of the decree, in possession or enjoyment of the property against which it was sought to be executed; and that neither the heirs of D. V., nor any persons through whom they claimed, were parties to the suit in which the decree was passed. *Rávasangji Mádhavsangji* v. *The Executors of Dayábhai.* A.C.J. 106.

2. On application by the judgment debtor to the Principal Ṣadr Amín to set aside the sale by auction of a house, in execution of a decree, on the grounds of material irregularities in publishing and conducting the sale, from which the applicant sustained substantial injury: the objections were disallowed as untenable, and the sale confirmed. But the District Judge, on appeal, set aside the sale for a ground on which he had no authority to interfere.

On petition to the High Court by the purchaser of the house:—*Held* that the order of the Judge must be set aside as illegal; and the original order, confirming the sale, allowed to stand. *Koshti* v. *Nárayaṇ Dhuláppá.* A.C.J. 110

See JUDGMENT BY DEFAULT. MORTGAGE.

SHARE CERTIFICATE. — *See* SHARES, SALE OF, 6.

SHARE IN A COMPANY.—*See* SHARES, SALE OF, 3.

"SHARE RECEIPTS."—*See* SHARES, SALE OF, 1, 3.

SHARES BARGAINED AND SOLD. —*See* SHARES, SALE OF, 2.

SHARES, HOLDERS OF. — *See* SHARES, SALE OF, 6.

"SHARES IN THE MARKET."— *See* SHARES, SALE OF, 1.

SHARES, OWNERS OF. — *See* SHARES, SALE OF, 6.

SHARES, SALE OF—

1. In January 1865, the plaintiffs purchased from the defendants 2,000 shares in the defendants' company; at 15 per cent. premium, for which they paid in cash Rs. 3,20,000, and the defendants simultaneously agreed to repurchase for future delivery and payment, at a fixed time in July, the same 2,000 shares at 29½ per cent. premium. The contracts for the repurchase were signed by three directors of the defendants' company, and on each was a memorandum, initialled by two of them, referring to a list of the "share receipts" delivered, with the words, "We are duly to examine and receive the same at the fixed time." 190 letters of allotment in the names of several persons, and for various numbers of shares, indorsed by the original allottees, and initialled by one of the three directors, were, together with receipts for the first call, handed over to the persons who acted for the plaintiffs, by the three directors of the defendants' company who made the contracts.

In April the defendants' company made a fresh call, payable on the 4th of May. A list of the names and addresses of the original allottees of what were called "shares in the market" (*i. e.*, other than those purchased by the company itself *for cash*, or held by it on mortgage), was made out from the deed of settlement, and notices of forfeiture for non-payment of the call were sent by post. The original holders of the 190 letters of allotment were included in the list; but no notice was sent to the plaintiffs. On the 27th of May all shares upon which the second call

was not paid were declared to be forfeited for the benefit of the Company. The defendants' company, as stated in the Memorandum of Association, was established, among other objects, for "the purchase and sale of Debentures, Stocks, Shares of Joint Stock Companies (including the shares of this Company), and other Securities, the making Loans and Advances on such Securities as the Directors of the Company may think fit."

Held that the contracts for the purchase of the 2,000 shares being within the scope of the authority of the directors, the defendants were bound by them; that the defendants were bound to treat the plaintiffs as the holders of those shares, and to give them the notice required by the Articles of Association, and that they were not at liberty to give that notice to the original allottees, who by the admission of the defendants, testified by the acts of their agents in making the contracts, had parted with the shares; that the shares were, consequently, not legally forfeited, and the defendants having refused to accept them, and they being then unsaleable, the plaintiffs were entitled to recover the full price as damages. *Oriental Financial Association* v. *Mercantile Credit and Financial Association.* O.C.J. 1

2. In a suit brought by a joint stock company in liquidation against a former director of the company for Rs. 27,30,000, on a promissory note, dated the 1st of March, and purporting to be payable on demand, but with the words in pencil: "Due 4th June," put on it the same day it was signed, in accordance with an understanding between the defendant and the other directors that they would not press him for payment before the latter date, and signed by the defendant some days after the day it bore date:—

Held that a one-anna stamp was not sufficient, under Schedule A, Cl. 10, of Act X. of 1862.

And, on the plaint being amended by claiming for the price of shares bargained and sold to the defendant, but not accepted by him; and for money found to be due on an account stated:—

Held that the plaintiffs could not recover; 1st, because no shares were really bargained and sold, as the plaint alleged; and what was done was, according to the intention and understanding of the parties, a mere form gone through, for the purpose of deceiving the public, and making it appear that 10,000 shares had been sold at a certain price; and, 2ndly, because the contracts were made for the purpose of defrauding other persons.

Held, also, that the 9th clause of the Articles of Association, providing that the existing shareholders for the time being should have the option of taking and subscribing for the shares in the additional capital, rateably and in proportion to their respective shares in the existing capital of the company, being imperative, and not merely directory,

a deviation from it could not be made unless with the assent of every shareholder. *Eastern Financial Association* v. *Pestanji Cursetji Shroff.* O.C.J. 9

3. *Held* that a contract to deliver shares in a public company is sufficiently performed when the vendor places the vendee in such a position as enables him to become the legal owner of them.

A share in a company signifies a definite portion of its capital; and does not necessarily mean the right of a person whose name is then actually on a register of shareholders. *Parbhudás Pránjivandás* v. *Rámlál Bhágirath.* O.C.J. 69

4. In a suit to recover damages for the non-acceptance of shares, where the vendor had contracted to execute proper transfers and do all other things necessary on his part to transfer the shares, and to bear the expense of such transfer:—

Held on the issue—whether the plaintiff was ready and willing to perform his part of the contract—that it was sufficient to show that he had in his possession, at the time fixed for the performance of the contract on his part, such certificates of the shares contracted to be sold as were required by the law, and that he tendered the same with a deed of transfer to the purchaser; and that it was not necessary for the vendor, before handing over the documents to the purchaser, to effect the transfer; but that it was the duty of the purchaser himself, in such case, having accepted the shares, to have the transfer made into his name in the books of the company.

The finding of the court below on the first issue being, therefore, reversed, the suit was remanded for trial of the issue—whether the contract was a wagering one—the Judge having omitted to determine that, and the defendant not having given evidence upon it, in consequence of the first issue being found for him on the evidence given by the plaintiff. *Maganbhái Hemchand* v. *Manchhábhái Kalliánchand.* O.C.J. 79

5. J. S., an allottee of 25 shares in a company registered under Act XIX. of 1857, signed the Memorandum and Articles of Association, and paid the first call on the 28th of September 1863, on which day he sold the 25 shares to B. P., the Chairman of the company. The purchase by B. B. was made in pursuance of an agreement entered into between B. P. and P. H., another Director of the company, and two other persons, who were members of the firm of B., B., and Co., the then Managers of the company, to buy in partnership 2800 shares of the company, which they, accordingly, jointly purchased, and subsequently divided among themselves; B. P. taking for himself two-fifths of the whole, including the 25 shares of J. S.

The fact of the joint purchase was not communicated to the other Directors of the company; nor was there any evidence to show that their attention had been called to certain

entries in the books of the company relating to B. P. having paid the second call on his two-fifths of the joint purchase.

J. S. got no notice to pay the second call, and never applied for or obtained a certificate for the 25 shares; but such a certificate was obtained by B. P., on the 10th of October 1864, certifying that J. S. was the shareholder. J. S. had signed a blank form of transfer, and a blank form of request to the Directors to transfer, which were undated and without particulars; but B. P. never executed the transfer as transferee, and the shares never were transferred to his name on the register, nor was the sale to him ever brought to the notice of the Directors as a Board, or any request made to them to sanction the transfer to him, or to any of his partners, of any portion of the 2800 shares; and the Articles of Association required the consent in writing of the Directors to every transfer.

On application by J. S. that his name should be removed from the list of contributories, as framed by the Official Liquidator, and the names of B. P.'s trustees under Act XXVIII. of 1865, substituted therein in respect of the 25 shares:—

Held that J. S. was not exonerated, under the circumstances, from the duty of obeying the Articles of Association and the provision of Act XIX. of 1857, that the act of an individual Director in his private capacity ought not to bind the Board, which had never authorised or ratified his conduct; and that the Official Liquidator, as representing the body of shareholders, rightly insisted upon keeping J. S.'s name on the list of shareholders. *In re East Indian and Banking Company: Jamnádás Sávaklál's Case.* O.C.J. 113

6. A company registered under Act XIX. of 1857, and enabled by its Memorandum of Association to purchase its own shares, purchased seven thousand of them which were in scrip, share certificates having never been issued in respect of them. The letters of allotment indorsed by the allottees, and receipts for the first call, were made over, at the time of purchase, to the company. No transfers, however, were executed by the allottees, nor were the shares registered by the company in their own name; but they continued to stand in the names of the allottees. Two thousand of the seven thousand shares had been resold by the company, and the remaining five thousand were mentioned in a list, kept by the company, of shares purchased by them.

On application by the allottees to have their names removed from the list of contributories, as framed by the official liquidator:—

Held, that the company, through its directors, having, as well by the act of purchase as by their subsequent conduct, treated themselves as the owners of the shares, could not be permitted to take advantage of their own neglect, or that of their officers, in not registering the shares in the name of the company;

and that the name of the company should, therefore, be substituted as holders of the shares. *Mercantile Credit and Financial Association, In re: Ex parte Dalvi and others.* O.C.J. 125

SHARERS.—*See* HINDU' TEMPLE, ENDOWMENT OF.

SHILOTRI' HAK.—*See* KHOTI' TENURE.

SMALL CAUSE COURT.—*See* HINDU' TEMPLE, ENDOWMENT OF.

SPECIAL APPEAL.—The High Court is not at liberty in a special appeal to draw any inference of fact from the evidence in the case. *Dwárkádás Lalubhái* v. *A'dam Alí Sultán Alí.* A.C.J. 1

SPECIAL APPLICATION.—*See* INSOLVENT COURT RULES.

"SPECIAL DAMAGE OF A PECUNIARY NATURE."—*See* CRIM. PROC. CODE, SEC. 44.

SPECIFIC PERFORMANCE. — *See* SHARES, SALE OF, 3.

SPECIFIC PERFORMANCE, REFUSING TO DECREE.—*See* MORTGAGE.

STAMP—

In determining the stamp required for any particular instrument, regard must be had to the real nature of the instrument, and not to the title which may have been given to it by the parties, if the contents of the instrument show that the title is a misnomer.

The discretion vested in a Court of Justice must be exercised in a sound and reasonable manner; and a capricious and unreasonable exercise of discretion on the part of a court of first instance, is an error in law, which it is the duty of an appellate court to correct. *Pendse* v. *Málse.* A.C.J. 94

See REMAND, 2.

STAMPING—

A bond stamped subsequently to the institution of a suit is valid, under the provisions of the Civil Procedure Code and of the Stamp Acts of 1860 and 1862: provided it be properly stamped when produced at the first hearing of the suit, and when the court is asked to receive it in evidence. *Atmárám Gulábrái* v. *Amirchand Rupchand.* A.C.J. 92

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11 & 12 VIC., c. 21.—*See* ACT XXVIII. OF 1865. O.C.J. 27, 29, 30

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26 & 27 Vic., c. 104. O.C.J. 141

STAYING OF SUITS—

In an application under Sec. 288 of the Civil Procedure Code, to execute an order of a District Court for the winding up of a company, by staying suits which had been filed against the company in the High Court :—

Held : 1*st*—That the order can take effect only from the time when it is filed in the court to which it shall have been transmitted for the purpose of being executed; and that suits can only be stayed from that time.

2*nd*—Where the decree in a suit has already been actually executed by the attachment of property of the defendants, although the sum decreed may not have been realised by a sale, there is no longer a suit or action to be stayed within the meaning of Sec. 72 of Act XIX. of 1857. *Náráyan Shámji* v. *Gújarát Trading Co.; Motírám Dalpatrám* v. *The same.* O.C.J. 20

SUBORDINATE MAGISTRATE.—*See* ACT XVIII. OF 1854, 2. MAGISTRATE OF THE DISTRICT, 1, 2. PENAL RECOGNISANCE TO KEEP THE PEACE. TOWN RULE, PENALTY FOR BREACH OF.

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SUPPRESSION OF TRUE VALUE OF PROPERTY.—*See* MORTGAGE.

SURPRISE.—*See* MORTGAGE.

SWORN.—*See* JURY, TRIAL BY.

TAILOR.—*See* FALSE IMPRISONMENT.

TESTAMENTARY POWER—

The title of a remote kinsman, though heir of a Hindú testator, who died without leaving issue, or any near relative surviving him, and with whom that remote kinsman had not been united in food, worship, or estate, cannot prevail against the title of a devisee of the property of that testator, whether such property was, by the testator, self-acquired, or held in severalty, either by virtue of a partition, or of the non-existence, or, if any ever did exist, the extinction of coparceners. *Narottam Jagjívan* v. *Karsandás Harikisandás.* A.C.J. 6

THEFT.—*See* ACT VI. OF 1864, 1.

"THEREBY INDUCED."—*See* EXTORTION.

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TOWN RULE, PENALTY FOR BREACH OF—

Held that a Subordinate Magistrate has no jurisdiction to impose a penalty for breach of a rule made by Town Commissioners under Act XXVI. of 1850, Sec. VII., Cl. 5. *Reg.* v. *Málharji bin Nauloji.* CR. CA. 36

TRADERS.—*See* ACT XIV. OF 1859, SEC. VIII. ACT XXVIII. OF 1865.

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VENDOR'S LIEN FOR UNPAID PURCHASE-MONEY—

In a suit claiming possession of land, purchased by the plaintiff from the defendant, the Munsif threw out the claim for want of consideration; but the District Judge found that the plaintiff was entitled to have the land, and that the defendant might sue him for the purchase-money:—

Held that the equitable doctrine of the vendor's lien for unpaid purchase-money applied to the case; but, as the District Judge had not decided whether the defendant had succeeded in proving that the purchase-money had not been paid, that the suit should be remanded for a finding, by him, on that issue. *Yelláppá bin Basáppá* v. *Mantáppá bin Basáppá.* A.C.J. 102

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YEARLY TENANT—

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In 1864, A sued B on a clause in the lease, which, he contended, gave him a right to remove certain trees

planted on the land:—*Held* that the breach of contract (if any) took place when B took possession of the land together with the trees, in execution of his decree in the ejectment suit; and that A's claim was barred by Cl. 10 of Sec. 1. of Act XIV. of 1859.

Where, on the expiration of a lease, the lessee is allowed to continue in possession as a yearly tenant, he does so on the terms contained in the expired lease, so far as they are consistent with a yearly holding. *Sayáji H. Bhadvalkar* v. *Umáji S. Rául.* A.C.J. 27

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